

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
LAURENCE LIPNICK AND BATTERY LANE, LLC**

Applicants

Kevin Foster
Eric Morrison
David Weber
Laurence Lipnick
Carl Starkey

For the Application

Stephen Z. Kaufman, Esquire
Heather Dlhopsky, Esquire
Debra S. Borden, Esquire

Attorneys for the Applicants

DPA 06-1
(Amending LMA No. G-808)

Shahriar Etemadi, M-NCPPC Technical Staff

County Witness Called by Hearing Examiner

Martin Klauber, Esquire, People's Counsel

Neither Supporting nor Opposing the Petition

Jim Humphrey, Chair,
Planning and Land Use Committee
Montgomery County Civic Federation

Opposed to the Petition

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. EXECUTIVE SUMMARY	3
II. STATEMENT OF THE CASE.....	4
III. FACTUAL BACKGROUND	7
A. ZONING HISTORY	7
B. SUBJECT PROPERTY.....	7
C. SURROUNDING AREA AND ADJACENT DEVELOPMENT.....	10
D. PROPOSED DEVELOPMENT	15
1. Development Concept	15
2. Development Plan & Binding Elements	17
3. Public Facilities (Water & Sewer Service, School Capacity, Traffic and Parking)	23
a. Water and Sewer Service.....	24
b. School Capacity	24
c. Traffic and Parking.....	25
4. Environment	28
E. LEGAL ISSUES AND COMMUNITY CONCERNS	29
1. The Open Meetings Act Objection:	30
2. Sector Plan Height Recommendations:	32
3. Continuing Presence of the Existing Single-Family Home:.....	34
IV. SUMMARY OF THE HEARING.....	35
A. APPLICANTS' CASE IN CHIEF	35
B. GOVERNMENT WITNESS.....	45
C. COMMUNITY WITNESS	47
D. PEOPLE'S COUNSEL	48
V. FINDINGS OF FACT AND CONCLUSIONS OF LAW	49
A. STANDARDS FOR COUNCIL REVIEW	49
B. REQUIRED FINDINGS	51
1. County Plans and Policies.....	51
a. The Applicable Master Plan or Sector Plan.....	52
b. The General Plan and the County Capital Improvements Program.....	55
c. Other County Policies (AGP and APFO)	56
2. Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility	56
a. Compliance with Zone Purposes, Standards and Regulations	57
b. Safety, Convenience and Amenity of Residents.....	64
c. Compatibility with Adjacent Development	64
3. Internal Vehicular and Pedestrian Circulation Systems and Site Access	64
4. Erosion, Preserving Vegetation, Forest Conservation and Water Resources.....	65
5. Ownership and Perpetual Maintenance.....	66
6. The Public Interest.....	67
C. CONCLUSION	67
VI. RECOMMENDATION	67

I. EXECUTIVE SUMMARY

Applicants:	Battery Lane, LLC, and Laurence Lipnick
DPA No. & Date of Filing:	DPA 06-1, filed July 20, 2005
Zone:	Planned Development (PD-75)
Development Plan Sought:	An 8 Story, 46 Unit, Mixed Use Condominium, with 8 MPDUs, a Restaurant, and the Existing Single-Family Detached Home.
Existing Development Plan:	10 Single Family Townhouses and an Existing Single-Family Home, with No MPDUs, Approved in LMA G-808, 3/30/2004
Current Use:	One Single Family Home on the North End and One Small Office Building on Battery Lane, with a Parking Lot in-between
Location:	Woodmont Avenue at Battery Lane, in Woodmont Triangle Area
Applicable Master Plan:	<i>July 1994 Bethesda CBD Sector Plan</i> and the <i>Woodmont Triangle Amendment</i> , approved and adopted March 2006
Gross Tract Area:	22,618 square feet or 52% of an Acre (includes 21,101 sq. ft. of net lot area + 1,517 sq. ft. of excess Woodmont Avenue ROW acquired from the County on 9/13/04)
Dedication of Right-of-Way:	596 square feet of ROW along Battery Lane was dedicated 7/24/02
Density Permitted in PD-75 Zone:	75 per acre = 39 Dwelling Units here (.52 acre X 75 = 39)
Density Planned:	91.5 per acre (<i>i.e.</i> , 47 Dwelling Units on .52 acre), allowed because 17% MPDUs results in a 22% bonus density credit
Green Space Required/Planned:	30% required (6,785 sq. ft.) / 30.6% planned (7,146 sq. ft.)
Parking Planned:	88 spaces (54 residential and 34 commercial)
Building Height Limits:	None specified in PD-75 zone; 65 feet specified in Sector Plan Amendment, which also recognizes additional height may be permitted when MPDUs are provided on site
Building Height Planned:	79 feet, 4 inches (65 feet + 22% bonus for MPDUs)
Storm Water Drainage:	Concept approved 1/15/02 in SM File #204689; Quantity Control waived; Quality Control at time of Build out. Revised Concept to be submitted before Site Plan
Neighborhood Response:	No neighborhood opposition, but opposed by Civic Federation
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Applicants Laurence Lipnick and Battery Lane, LLC (a/k/a “Woodmont View”), filed Development Plan Amendment 06-1, on July 20, 2005, seeking to amend the development plan approved by the Council on March 30, 2004 in LMA G-808. That Council Resolution (No. 15-563) reclassified 21,101 square feet of land located at 4811 Battery Lane, Bethesda to the PD-75 (Planned Development) Zone and accepted Applicants’ former plan to develop the property with 10 townhomes and an existing single family detached home.¹ Applicants’ present plan (*i.e.*, DPA 06-1) would instead develop the subject site with an eight-story, 46 unit, mixed-use condominium, including eight moderately priced dwelling units (MPDUs) and a restaurant. The existing single-family detached home on the northern end of the property (Mr. Lipnick’s residence) would also be retained, but the existing four-story² office building on the southern extreme of the property would be demolished.

The subject property (designated the “Trunnell property” in the *1994 Bethesda CBD Sector Plan*) is part of Lot 48, Block 2, Northwest Park, Plat No. 134, and is bounded by Woodmont Avenue to the east, Battery Lane to the south, the “Aldon” property³ (Lot 22, Block 2) to the west, and the National Institutes of Health to the north. The subject property is in the 7th Election District and has tax accounts numbered 03379057 and 03379068.

The application for the development plan amendment was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), and in a report dated January 25, 2006, Staff recommended approval (Exhibit 25).⁴ The Montgomery County Planning Board (“Planning Board”) considered the application on February 2, 2006 and, by a unanimous vote,

¹ The Hearing Examiner takes official notice of the record in the rezoning case, LMA G-808.

² Technical Staff refers to the office building as a “four-story” structure (Exhibit 25, p.2), although it appears to the Hearing Examiner to be a three-story structure. The distinction is irrelevant to this case.

³ The Aldon property is called that because it is run by Aldon Management, but it is referred to as “Site 1” in the 1994 Sector Plan and occasionally as the “Brown” property, because that is the surname of the current owners.

⁴ The Technical Staff Report is quoted and paraphrased frequently herein.

also recommended approval, as stated in the Board's memorandum dated February 27, 2006, and forwarded to the Office of Zoning and Administrative Hearings (OZAH) on March 10, 2006 (Ex. 27).

Unfortunately, the application and file had to be returned to the Planning Board for a review by the Alternative Review Committee (ARC) and for consideration of other issues.⁵ Ultimately, Technical Staff filed an amended report (Exhibit 32) attaching the ARC review and recommending approval of the DPA without a public hearing before the Hearing Examiner. The Planning Board agreed with Technical Staff on the merits of the application, and voted unanimously on December 21, 2006, to recommend approval; however, the Planning Board disagreed with Technical Staff's recommendation to avoid the public hearing, voting to send the matter to OZAH for a public hearing, as discussed in its memorandum dated January 10, 2007 (Exhibit 33).

⁵ Because there was no opposition to the application, and the Planning Board did not initially recommend a public hearing (nor was one requested by any aggrieved party), the matter would ordinarily have been forwarded by the Hearing Examiner directly to the Council for approval, pursuant to Zoning Ordinance §59-D-1.74(c)(3). However, review of the file by the Hearing Examiner revealed that the application had not been considered by the Alternative Review Committee (ARC), as required by Zoning Ordinance §59-D-1.61(a), when an applicant seeks bonus density and/or height through the inclusion of on-site MPDUs. The proposal seeks a density of 91.5 dwelling units per acre (for a total of 47 units), which is more than the 75 dwelling units per acre permitted in the PD-75 Zone, and a height of 79.3 feet, which is more than the 65 foot limit recommended in the Sector Pan.

The Hearing Examiner therefore e-mailed Technical Staff on March 14, 2006, pointing out the need for an ARC review and suggesting that Technical Staff also consider whether the drastic revision of the development plan from what was originally approved by the Council in G-808 (going from 10, three-story townhouses to a mid-rise, 79 foot tall condominium with 46 units and a restaurant) warrants a public hearing by OZAH regardless of the fact that there was no opposition. *See* Exhibit 28. On March 21, 2006, Technical Staff informed the Hearing Examiner that it had decided to submit the matter to the ARC for its review, and the file was therefore returned to the Planning Board the following day. OZAH sent a memorandum with the file summarizing the ARC review issue and reiterating the Hearing Examiner's concern that, unless the Planning Board requested an OZAH hearing, the proposed DPA would have to be forwarded to the Council without giving that body an evidentiary basis, developed in a public hearing, to evaluate the new development plan. *See* Exhibit 30. The ARC subsequently reviewed the subject proposal, and it determined that the project would not be financially feasible unless applicable density and height limits were lifted.

On November 28, 2006, Technical Staff filed an amended report (Exhibit 32), attaching the ARC's memorandum to the Planning Board, and once again recommending to the Planning Board that the application be forwarded to the Council without an OZAH public hearing. On December 19, 2006, the Hearing Examiner e-mailed Technical Staff to express his concern about Staff's renewed recommendation to forward this proposal to the Council without an OZAH hearing, and the fact that it had been placed on the Planning Board's "consent agenda" without giving the Board the opportunity to review the public hearing issue (Exhibit 34). On December 20, 2006, Martin Klauber, the People's Counsel, sent an e-mail to the Hearing Examiner requesting a public hearing for the reasons stated in the Hearing Examiner's December 19 e-mail (Exhibit 35). Thereafter, the subject case was moved from the Board's consent agenda to its regular calendar, and the Planning Board voted unanimously on December 21, 2006, to recommend approval and to send the matter to OZAH for a public hearing, as discussed in its memorandum dated January 10, 2007 (Exhibit 33).

A public hearing was noticed for January 29, 2007 (Exhibits 37 and 45), and it took place as scheduled. In addition to Applicants' witnesses, the hearing was attended by Martin Klauber, the People's Counsel; Shahriar Etemadi of Technical Staff's Transportation Planning Division; and Jim Humphrey, Chair of the Planning and Land Use Committee of the Montgomery County Civic Federation (MCCF). At the beginning of the hearing, Mr. Klauber objected to the legality of the process (1/29/07 Tr. 17-18)⁶ because the Alternative Review Committee, which is a public body created in Zoning Ordinance §59-D-1.61(a), met to determine the financial feasibility of this project, but allegedly failed to conduct an open and noticed meeting in accordance with the Open Meetings Act, Maryland Code-State Government Article, §§10-501, *et seq.* Because this issue was first raised at the hearing, the Hearing Examiner gave all parties an opportunity to brief this question and other legal issues raised at the hearing. Since the record in this type of case must close at the end of the hearing,⁷ a second hearing date, February 23, 2007, was chosen, with the parties' consent.

Following the receipt of submissions from the parties (Exhibits 61, 64, 65, 68, 69, 71(a) and 72), the Hearing Examiner, on February 22, 2007, issued an order overruling Mr. Klauber's objection to the legality of the proceedings (Exhibit 73). Rulings on other issues were announced at the February 23, 2007, hearing, which resumed as scheduled. The legal issues will be discussed in Part III.E. of this report.

Although all parties had intended for February 23, 2007, to be the final hearing date, Applicants had inadvertently failed to provide opponent Jim Humphrey with a copy of the traffic study they had performed between the first and second hearing dates (Exhibit 70(a)), and Mr. Humphrey indicated that he could not fully represent the Civic Federation's position on traffic matters without giving that organization some time to review the Traffic Study. After receiving some

⁶ There were three hearing days in this case. The transcripts are identified by the date of hearing and the page number. For example, the citation, "1/29/07 Tr. 17-18," indicates pages 17 to 18 at the January 29, 2007 hearing date.

⁷ Zoning Ordinance §59-D-1.74(d)(2).

additional testimony on non-traffic matters, the completion of the hearing was postponed to March 9, 2007, to avoid prejudice to the Civic Federation. Following the adjournment, Applicants submitted three alternative Site Plans (Exhibits 78(a), (b) and (c)), in an effort to remove issues regarding traffic and parking on site.

The hearing resumed as scheduled on March 9, 2007, and was completed on that date. During the course of the final day of hearing, the parties suggested further possible refinements to the language of the Binding Elements. As required by statute, the record closed at the completion of the hearing.

III. FACTUAL BACKGROUND

A. Zoning History

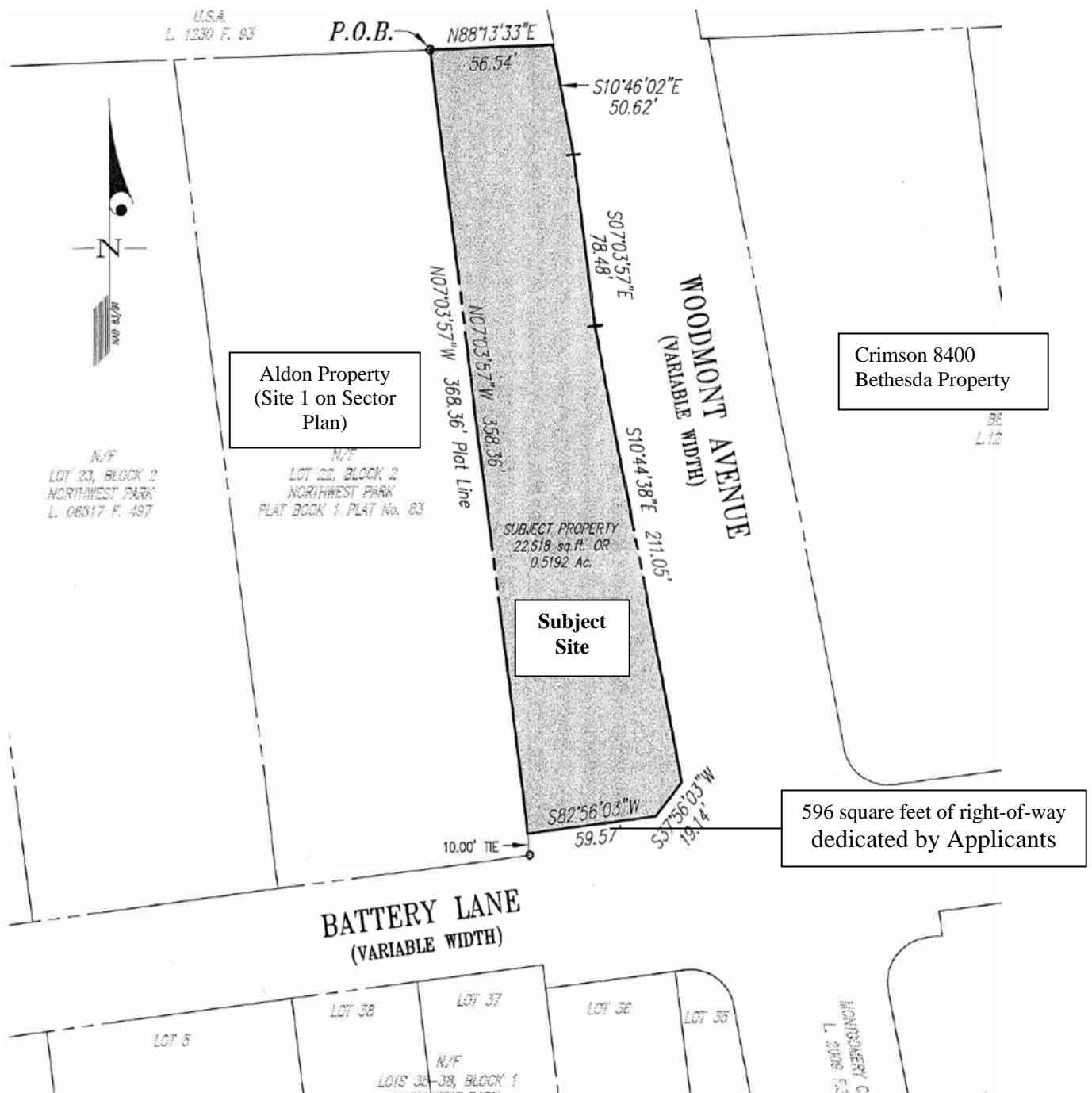
In the 1954 Regional District zoning, this area was zoned R-60. In 1958, the R-60 Zone was reaffirmed as part of the Countywide comprehensive zoning. On December 6, 1977, SMA G-20 reaffirmed the R-60 Zone. On December 12, 1989, Local Map Amendment G-636 changed the R-60 Zone to the C-T Zone. That change was reaffirmed on October 11, 1994 in SMA G-711. On March 30, 2004, Local Map Amendment G-808 reclassified the subject site to the PD-75 (Planned Development) Zone in Council Resolution No. 15-563.

B. Subject Property

The subject property is part of Lot 48, Block 2, Northwest Park, as mentioned above. Applicants have a “Common Driveway Agreement” (Exhibit 14) with the owners of the adjacent Aldon property (Lot 22, Block 2), located to the west, and have the support of the owners of the confronting “Crimson 8400 Bethesda” property, to the east (Exhibit 21). The subject site has approximately 60 feet of frontage with Battery Lane and 340 feet of frontage along Woodmont Avenue. It has a net lot area of 21,101 square feet, and is rectangular in shape. The site has a gross tract area of 22,618 square feet (52% of an Acre) because Applicants acquired 1,517 square feet of excess Woodmont Avenue right-of-

way (ROW) from the County on September 13, 2004, *i.e.*, prior to this application (21,101 square feet of net lot area + 1,517 square feet = 22,618 square feet). *See* Exhibit 15. Applicants dedicated 596 square feet of Battery Lane ROW to the County on July 24, 2002 (Exhibit 13).

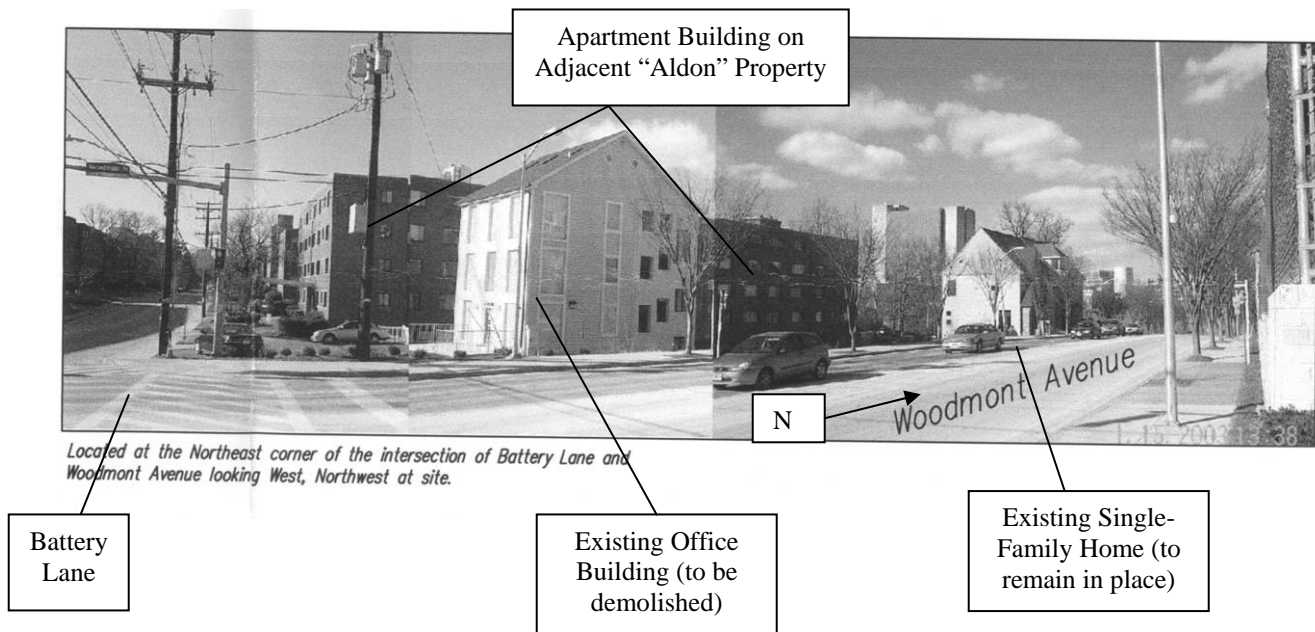
The subject property, as well as the adjacent Aldon property and the confronting Crimson property, are all shown on the plat map (Exhibit 52(b)), below:



The same area is clearly shown on the following aerial photograph from page 10 of the initial Technical Staff report (Exhibit 25). The site is depicted as it currently exists:



The site is currently zoned PD-75 and is served by the requisite public utilities. According to Applicants' engineer, David Weber, there is adequate water and sewer service capacity to serve the property, and the existing public storm drain line on the adjoining property, contiguous to the subject property, has adequate capacity to take storm water runoff away (1/29/07 Tr. 108-109 and Exhibit 38(c)). The topography slopes down from east to west, and there are no natural resources (wetlands, streams, flood plains or forest) on the property. At the north end of the property is a detached, single-family home occupied by Applicant Lipnick, and at the south end is an unusual-looking four story office building which Applicants plan to demolish. Between the two buildings is a gravel parking lot. The property is depicted below in a photograph from the record of LMA G-808, looking west-northwest at the site:



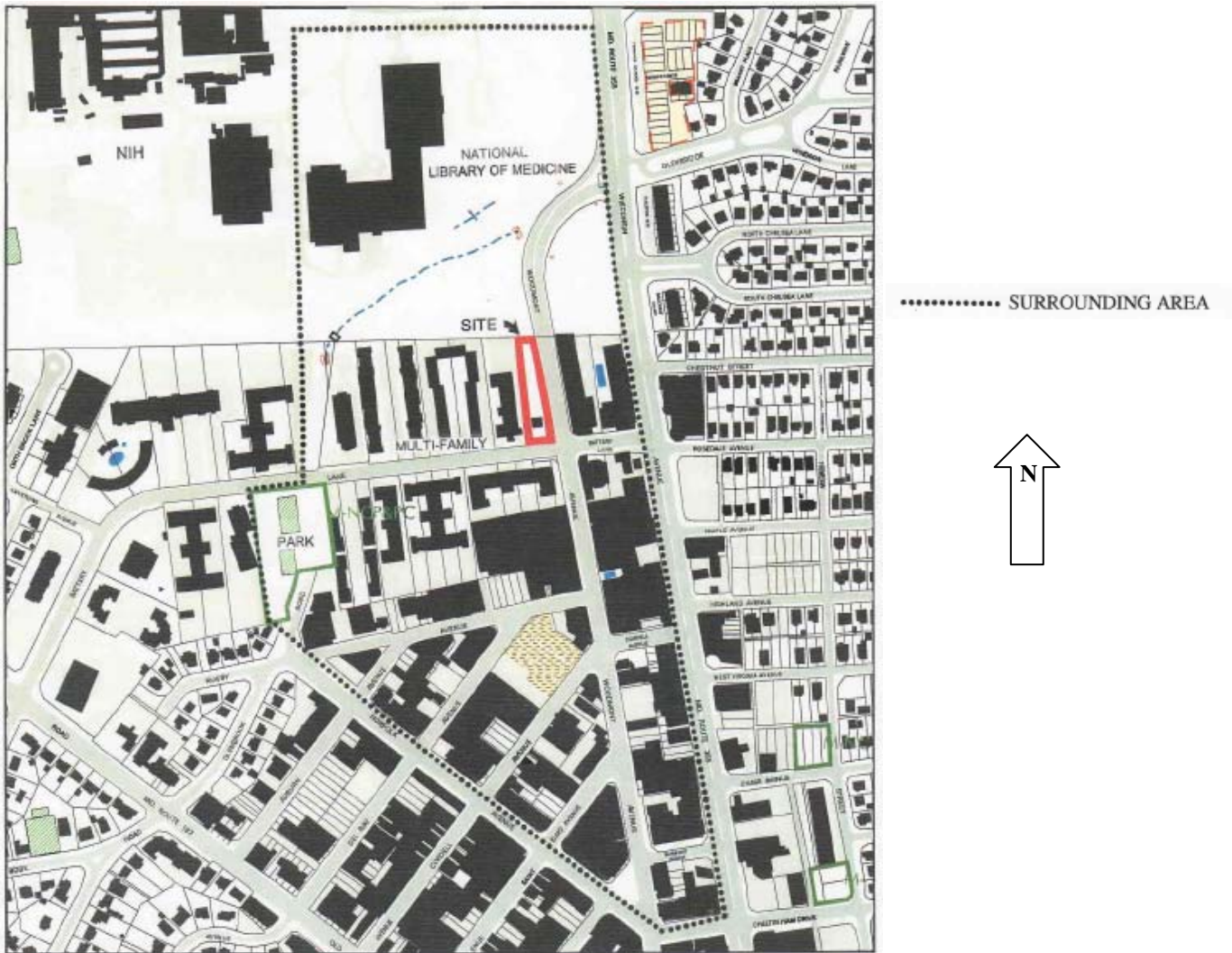
C. Surrounding Area And Adjacent Development

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the

surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommends designating the surrounding area as:

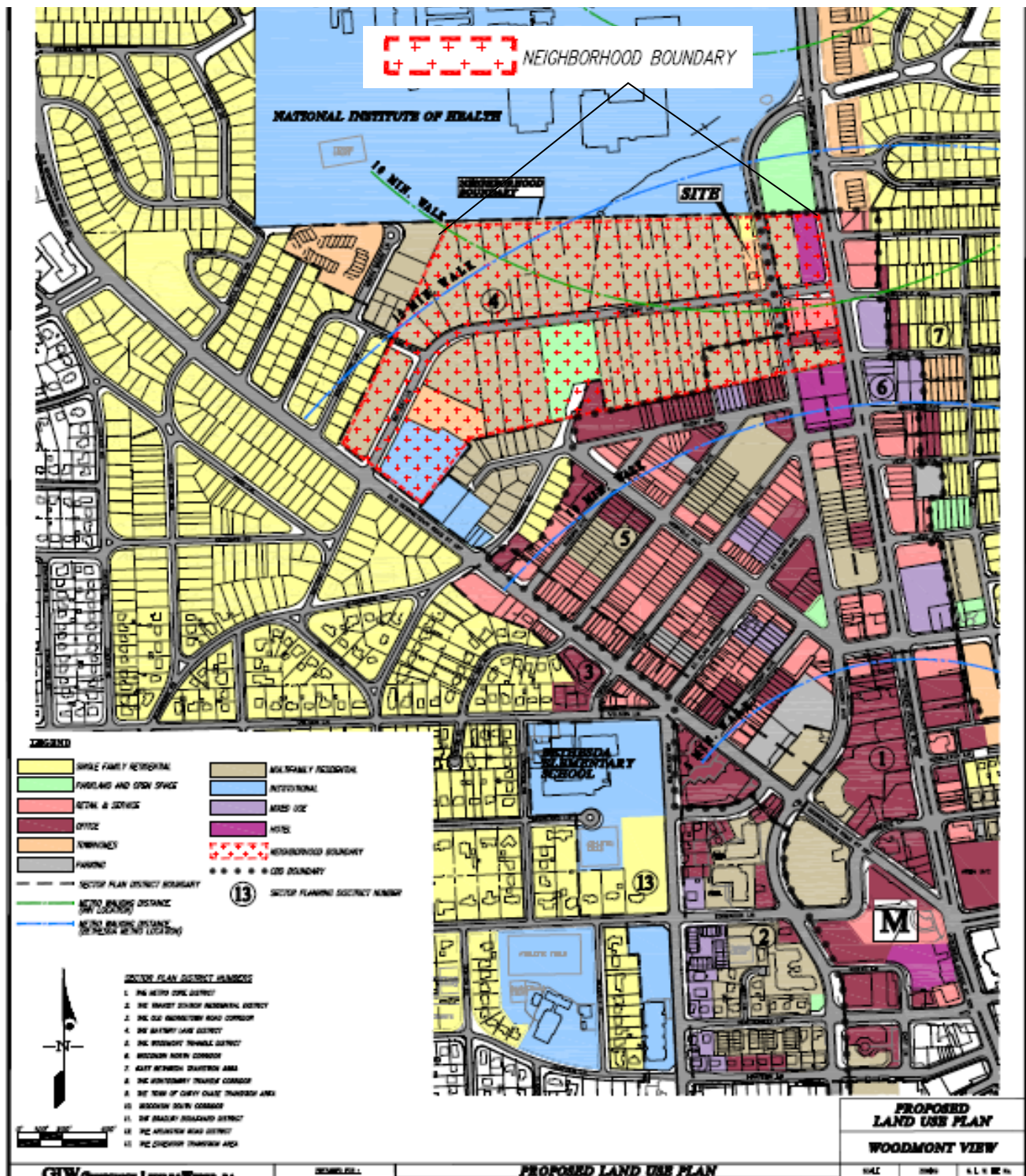
extend[ing] out from the intersection of Battery Lane and Woodmont Avenue to the Battery Lane Urban Park to the west, Norfolk Avenue and Chase Avenue to the south, Wisconsin Avenue to the east and the National Library of Medicine on the National Institutes of Health (NIH) campus to the north. [Exhibit 25, p. 2]

This definition includes essentially the same area as previously defined in LMA G-808 and approved by the Council in that case.⁸ That area is shown below in a copy of the surrounding area vicinity map supplied by Technical Staff for the G-808 rezoning case:



⁸ It is “essentially” the same because the previous definition extended a block further to the south, to Cheltenham Drive, while Technical Staff’s current suggestion stops at Chase Avenue to the south. This difference was apparently unintentional because Technical Staff states that this area was the one previously approved by the Council.

Applicants' land use expert, Kevin Foster, described a somewhat different surrounding area, one that extends further westward, but not as far south or north. The area he described is coextensive with the Battery Lane District as set forth in the *July 1994 Bethesda CBD Sector Plan* (p. 91). 1/29/07 Tr. 126. It is shown below in Exhibit 49, Applicants' "Proposed Land Use Plan."



While there is nothing fundamentally wrong with either suggested definition of surrounding area, the Hearing Examiner accepts the one previously adopted by the Counsel for G-808, to avoid confusion. The present DPA application case grows directly out of the decision in that case.⁹

Mr. Foster noted that the Battery Lane neighborhood is predominantly an older multi-family neighborhood. He stated that there are quite a number of “mid-rise, low-rise residential apartments” on Battery Lane, all the way to Old Georgetown Road, and there is a commercial area between Woodmont Avenue and Wisconsin Avenue which includes an existing hotel. That hotel is on the site of the proposed 200 unit condominium building known as 8400 Wisconsin Avenue (*i.e.*, the “Crimson” property). In the block along Wisconsin, south of Battery Lane, there is a combination of residential and commercial office uses. There is also a parking garage on the south side of Battery Lane within this area. 1/29/07 Tr. 127.

Surrounding the subject site are properties zoned R-60, R-10, R-10/TDR, and CBD. As mentioned in the Hearing Examiner’s report in connection with LMA G-808, the land use and zoning pattern for the area reflects a mix of residential, commercial and institutional land uses. North of the subject property is R-60 zoned land surrounding the Library of Medicine on the grounds of NIH. Confronting to the east and southeast are uses in the CBD-1 Zone, including a Sheraton Hotel and a development with lower-level office/retail and upper floor residential uses. Confronting to the south and adjoining to the west are multi-family residential buildings in the R-10 and R-10/TDR Zones. These buildings range in height from three to five stories. Further to the west is the Battery Lane Urban Park operated by M-NCPPC.

These uses are shown on Exhibit 49, which is reproduced on the previous page. Some sense of the surrounding area can also be obtained by examining an aerial photograph from the initial Technical Staff report (Exhibit 25, p.9), shown on the following page:

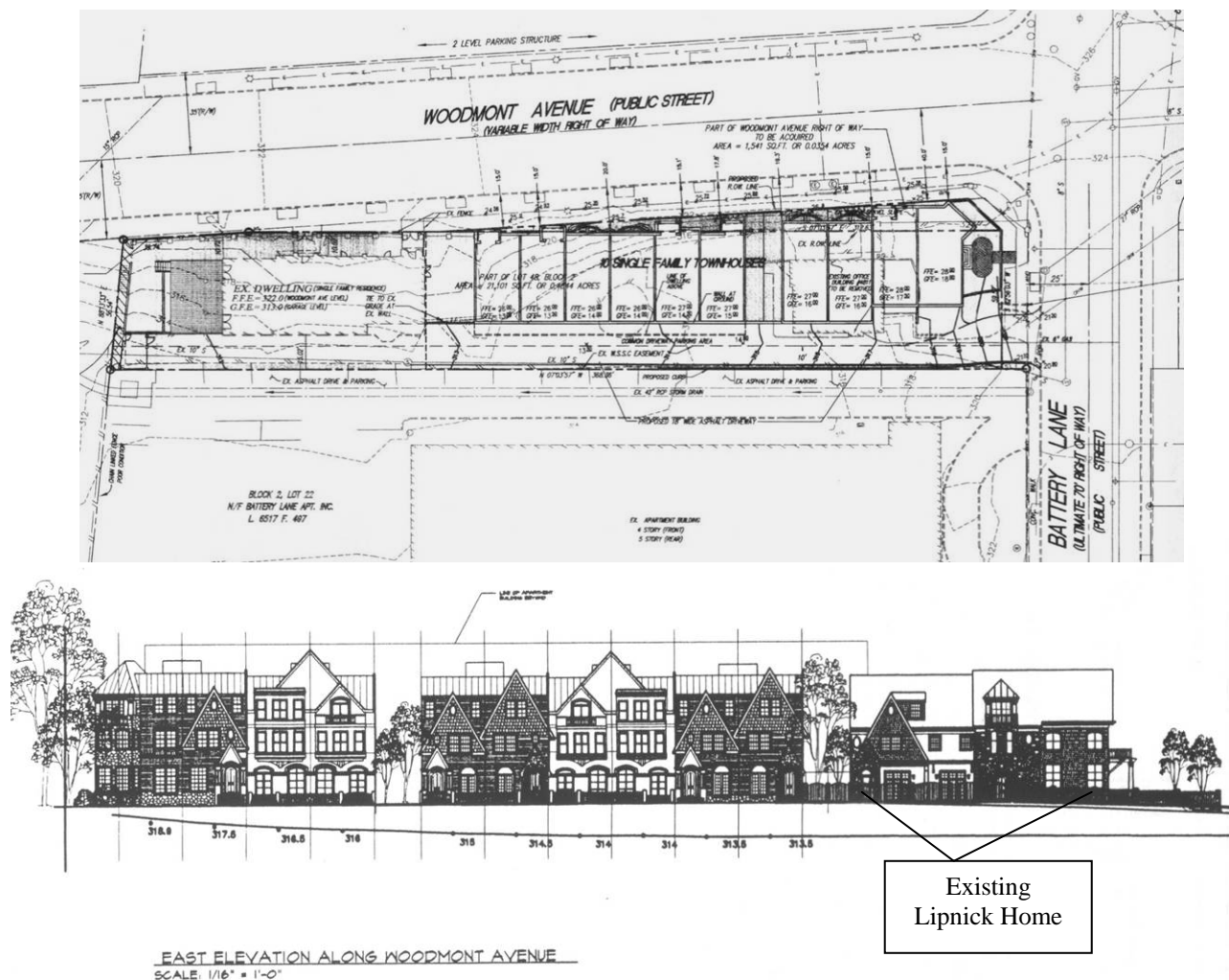
⁹ Mr. Foster may have thought he was using the same definition as before because he suggested as much in response to the Hearing Examiner’s questions. 1/29/07 Tr. 128.



D. Proposed Development

1. Development Concept

Applicants' initial plan in LMA G-808 called for a row of ten townhouses next to the existing single-family home to provide a gateway from the north to the Woodmont Triangle of Bethesda.¹⁰ Shown below is the development plan approved in G-808 for the ten townhouses, followed by an illustrative east-elevation diagram showing Applicants' previous concept of the intended view along Woodmont Avenue. It is reproduced from the Hearing Examiner's report in G-808:



¹⁰ The "Woodmont Triangle Study Area," as defined in the 2006 Woodmont Triangle Amendment, is the area of downtown Bethesda mostly outlined by Old Georgetown Road on the southwest, National Institutes of Health (NIH) on the north and Wisconsin Avenue on the east. This definition is somewhat broader than the definition of the "Woodmont Triangle District," contained in the 1994 Bethesda CBD Sector Plan, which cut off this District half a block north of Rugby Avenue and half a block east of Woodmont Avenue.

The new proposal, DPA 06-1, like the old one, would retain the Lipnick single-family residence on the north end of the property and would demolish the existing four-story office building on the south end of the site. The big difference is that the proposed group of ten townhouses, with no MPDUs, would be replaced with a proposed eight-story condominium, with 46 dwelling units, including eight MPDUs and a restaurant. It would be 79 feet, 4 inches tall.¹¹ That proposed height engendered one of the issues in this case because the Sector Plan recommends a height of 65 feet. This issue will be discussed in Part III.E. of this report. Shown below is Applicants' concept of the way the development will look from various sides when completed (Exhibit 56):



¹¹ The building height is variously expressed in the record as 79.3 feet or 79 feet, 4 inches, which are approximately the same.

As is apparent, the planned architectural style of the new development is similar to the architecture set forth in the G-808 development plan, but the intended structure is much bigger.

Whether the new development plan is compatible with surrounding development and consistent with the applicable Sector Plan, as amended, will be discussed in Part V. B. of this report.

2. Development Plan & Binding Elements

Pursuant to Code § 59-D-1.11, development in the PD-75 Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD-75 Zone or upon approval of an amendment to that development plan pursuant to Code §-D-

1.7. The development plan must contain several elements, which are specified in Code §59-D-1.3:

- (a) A natural resources inventory;
- (b) A surrounding area map, showing the relationship to the site and use of the adjacent land;
- (c) A land use plan showing site access; locations and uses of all buildings and structures; a preliminary classification of dwelling units; locations of parking areas, including number of parking spaces; location of land to be dedicated to public use; location of land intended for common or quasi-public use but not intended to be in public ownership; and a preliminary forest conservation plan;
- (d) A development program stating the sequence of proposed development;
- (e) The relationship, if any, to the County's capital improvements program;
- (f) [Inapplicable to the PD-75 Zone];
- (g) [Inapplicable to the PD-75 Zone];
- (h) [Inapplicable to this case since the commercial portion of this plan is not sought pursuant to either §59-C-7.132(a) or §59-C-7.33(c)(1),¹² and no change in the "density category" is being requested.¹³]; and
- (i) [Inapplicable to this case since the site is not within a special protection area].

In the present case, we are examining a proposed amendment to the development plan, rather than a rezoning application. The standards for review are similar, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record "in the same

¹² It is sought pursuant to §59-C-7.132(b), which permits commercial uses if they are permitted by the applicable master plan, are consistent with the purposes of the PD Zone and are compatible with surrounding uses. Code §59-C-7.132(a) pertains to commercial uses not indicated in the master plan, and §59-C-7.33(c)(1) refers to sites in the Planned Neighborhood Zone, not the Planned Development Zone.

¹³ It should be noted that the actual density requested is greater than the 75 dwelling units per acre ordinarily permitted in the PD-75 category due to the inclusion of on-site MPDUs, but no change in the "density category" is being requested.

manner as the record is compiled for a local map amendment application.” However, some requirements, such as Item (h), above, are inapplicable.

The Development Plan and the Land Use Plan that constitutes one of its primary parts are binding on the Applicants except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements (*i.e.*, those that the District Council will consider in evaluating compatibility and compliance with the zone) cannot be changed without a separate application to the District Council for another development plan amendment.

The textual binding elements here include the following:

1. The maximum number of dwelling units will be 47, including 17% MPDUs (or 8 MPDUs).
2. The building height is proposed for 79 feet 4 inches measured from the adjoining curb grade along Woodmont Avenue to the highest point of the main roof slab (the roof area covering the major area of the building excluding mechanical, access, elevator penthouses, and decorative gables) with final height measurement subject to review and adjustment by the Planning Board at site plan approval.
3. The minimum setbacks will be 0 feet for the front yards on Woodmont Avenue and Battery Lane, 11.5 feet for the side yard to the west, and 40.5 feet for the rear yard from the existing building at the north property line.
4. The minimum green space will be 30% of the gross tract area.
5. All green areas (including the active/passive recreation rooftop green area) for the condominium building will be accessible to all residents of the condominium building.
6. The maximum building coverage will be 60% of the site area.
7. The minimum number of parking spaces for the residential units will be 54, and the number of parking spaces required for the commercial use will comply with the Zoning Ordinance.
8. This property is subject to a Common Driveway Agreement recorded at Liber 26425, Folio 122 among the Land Records of Montgomery County. The Common Driveway Agreement sets forth the agreement between the applicant and the adjacent property owner to share certain portions of their respective properties for mutual ingress and egress

from Battery Lane in order to achieve more efficient, convenient, and safer access to both properties.

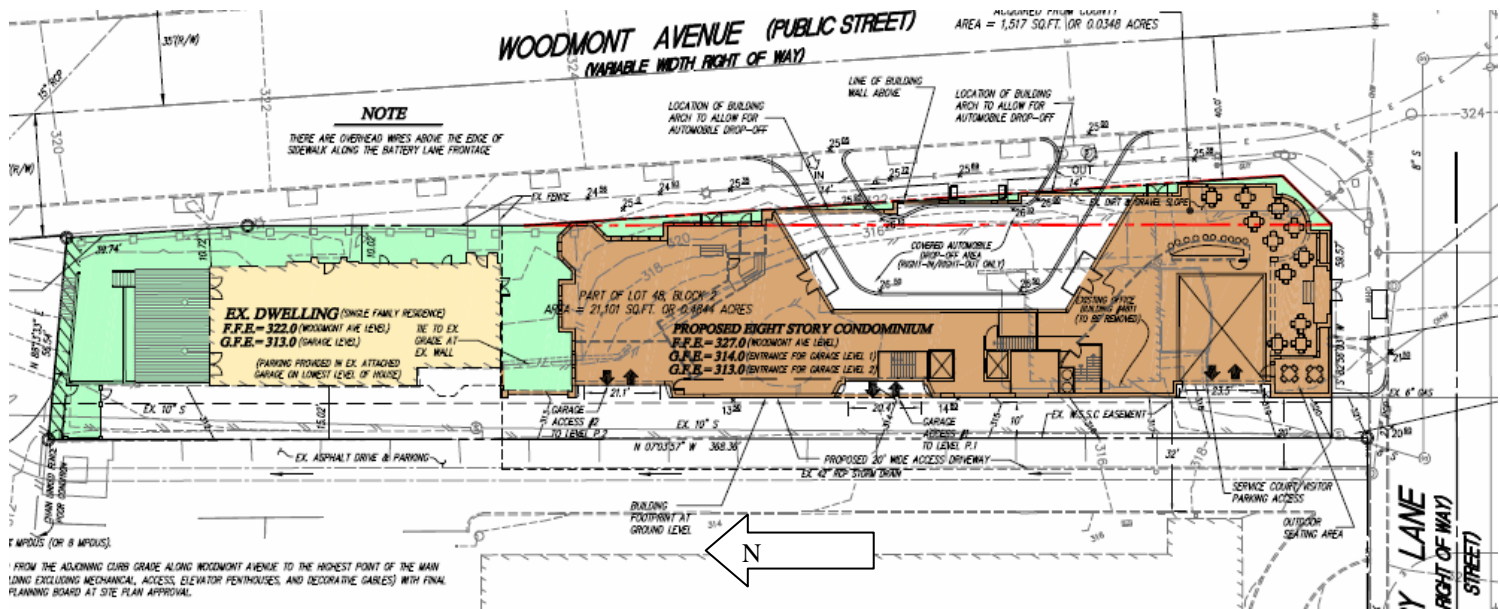
9. Applicant shall submit a revised Stormwater Management Concept Plan to be approved prior to site plan.
10. The Street commercial space in the planned building will be occupied by a “Quality Restaurant” as described in the Institute of Transportation Engineers (ITE) Trip Generation Manual, 7th Edition, page 1703, not by any more intensive commercial use (*i.e.* one producing more peak hour traffic).¹⁴

The land use plan for the present zoning application,¹⁵ Exhibit 78(b), is entitled “Alternative Amendment To Development Plan” and is referred to in this report as the “new development plan” or the “development plan amendment.” A copy of the new development plan is reproduced on the following pages. In order to make its details more visible, its diagram and text have been printed separately. The Textual Binding Elements, which appear on the face of the development plan, will not be depicted below because they are already set forth above. The diagram, which is also binding on the Applicants, shows the proposed locations and general dimensions of all structures, as well as additional information regarding the planned development. It is followed by General Notes, Site

¹⁴ At the first hearing date, Applicants’ counsel indicated that “we are not proposing a different use than a restaurant. If we did we’d have to come and get an amendment..” 1/29/07 Tr. 230-231. Following that first day of hearing, Applicants suggested for the first time that they would prefer to have the flexibility of using their planned commercial space as something other than a restaurant, should they later elect to do so. If it had been timely raised (*i.e.*, before Technical Staff and the Planning Board), the Hearing Examiner would not have had a problem with giving Applicants that option, as long as the development plan committed them to providing adequate parking for the most intense possible commercial use and limited traffic generation to specified parameters. Applicants submitted an alternative development plan amendment (Exhibit 78(c)) with language to effectuate this end as a proposed substitute for Textual Binding Element #10, set forth above. This proposed substitute language was further refined during the hearing by Applicants’ counsel, with the assistance the People’s Counsel’s edits (Exhibit 84). However, because both the Technical Staff and the Planning Board reviewed Applicants’ proposal with the understanding that a restaurant was projected for the commercial space (*See* Exhibit 25, pp. 1 and 3), the Hearing Examiner feels it would not be appropriate to make this change without giving those bodies the opportunity to evaluate the benefits and detriments of non-restaurant commercial uses at this site. Therefore, the Hearing Examiner recommends the approval of the Development Plan (Exhibit 78(b)) which limits the commercial use to a restaurant, as set forth in Textual Binding Element #10, above. The restaurant is specified as a “quality restaurant” because that is the term used by the ITE Trip Generation Manual (Exhibit 80) to describe the type of restaurant which, in combination with the other uses on the property, would generate the fewest morning and evening peak hour trips.

¹⁵ The Exhibit Applicants labeled as the “Proposed Land Use Plan” (Exhibit 49) depicts the entire surrounding area and not the details of the subject site, as was contemplated in the requirements for a “land use plan” in Code §59-D-1.3(c); however, their Exhibit labeled “Alternative Amendment To Development Plan” (Exhibit 78(b)) does meet the requirements for a “land use plan” in that section.

Information, Parking Required, a Development Standards Tabulation and the Plan's Legend, all copied from the Development Plan Amendment (Exhibit 78(b)):



PARKING REQUIRED:

RESIDENTIAL REQUIREMENTS:

EX. SINGLE FAMILY HOUSE:	2 SPACES
27 ONE BEDROOMS @ 1.25 SPACES:	33.8 SPACES
19 TWO BEDROOMS @ 1.5 SPACES:	28.5 SPACES
SUBTOTAL:	64.3 SPACES
17% PARKING SPACE REDUCTION PER ZONING SECTION 59.E.3.33(b)(3):	-10.9 SPACES

COMMERCIAL REQUIREMENT:

(PROPOSED 3,200 SF GROSS COMMERCIAL AREA)	
1280 SF PROPOSED RESTAURANT PATRON AREA	
1280 SF @ 25 SPACES/1000 SF:	32 SPACES
128 SF PROPOSED OUTDOOR SEATING PATRON AREA	
128 SF @ 15 SPACES/1000 SF:	2 SPACES
TOTAL COMMERCIAL SPACES:	34 SPACES

TOTAL PARKING REQUIRED: 88 SPACES

PARKING PROVIDED:

EX. SINGLE FAMILY GARAGE PARKING:	2 SPACES
UNDERGROUND PARKING GARAGE LEVEL P1 WITH ATTENDANT PARKING PER SEC. 59.E.2.4:	42 SPACES
UNDERGROUND PARKING GARAGE LEVEL P2	33 SPACES
SERVICE COURT WITH ATTENDANT PARKING PER SEC. 59.E.2.4:	11 SPACES
TOTAL PARKING PROVIDED	88 SPACES

GENERAL NOTES

1. NRI/FSD & FOREST CONSERVATION NOTE
NRI/FSD #4-02206E APPROVED 01/25/02. SITE IS EXEMPT FROM FOREST CONSERVATION REQUIREMENTS BASED ON THE "SMALL PROPERTY EXEMPTION".
2. STORMWATER MANAGEMENT NOTE
CONCEPT WAS APPROVED ON 1/15/02 AS SM FILE #204689. QUANTITY CONTROL REQUIREMENTS ARE WAIVED. QUALITY CONTROL IS REQUIRED IN THE FUTURE AT THE TIME OF ULTIMATE "BUILT-OUT" OF THE SITE, AND IS SHOWN HEREON.
3. SEDIMENT CONTROL NOTE
SMALL LAND DISTURBANCE PERMIT No. 204694 WILL BE ISSUED UPON PAYMENT OF THE SWM QUANTITY WAIVER FEE.
4. LIGHTING NOTE
THERE IS NO PROPOSED LIGHTING OF THESE RESIDENCES OTHER THAN MINOR AREA WAY LIGHTS ON THE DWELLING.
5. FLOOD ZONE DESIGNATION
SUBJECT PROPERTY LINES WITHIN ZONE C, AREAS OF MINIMAL FLOODING AS SHOWN ON F.E.M.A. N.F.I.P., F.I.R.M. COMMUNITY PANEL NO. 240049-0175-C, REVISION DATED AUGUST 1, 1984.

SITE INFORMATION

LOT AREA:	21,101 SQ. FT.
EXCESS RIGHT OF WAY ACQUIRED FROM COUNTY:	1,517 SQ. FT.
GROSS TRACT AREA:	22,618 SQ. FT.
EXISTING ZONING:	PD 75
<u>DENSITY ALLOWED</u>	
DENSITY ALLOWED (0.52 X 75DU/AC.):	39 DU
(22%) CREDIT FOR MPDU:	8 DU
TOTAL DU ALLOWED:	47 DU
<u>DENSITY PROVIDED</u>	
TOTAL UNITS PROVIDED AT MARKET VALUE:	39 DU
1 SINGLE FAMILY DWELLING:	1 DU
38 CONDOMINIUM UNITS:	38 DU
+ MPDU (17% OF TOTAL):	8 DU
TOTAL DU PROVIDED	47 DU
<u>GREEN SPACE REQUIRED:</u>	6,785 s.f. (30%)
<u>GREEN SPACE PROVIDED:</u>	
GROUND FLOOR:	4,030 s.f.
PENTHOUSE (SEE ARCH PLANS):	3,116 s.f.
	7,146s.f. (31.6%)

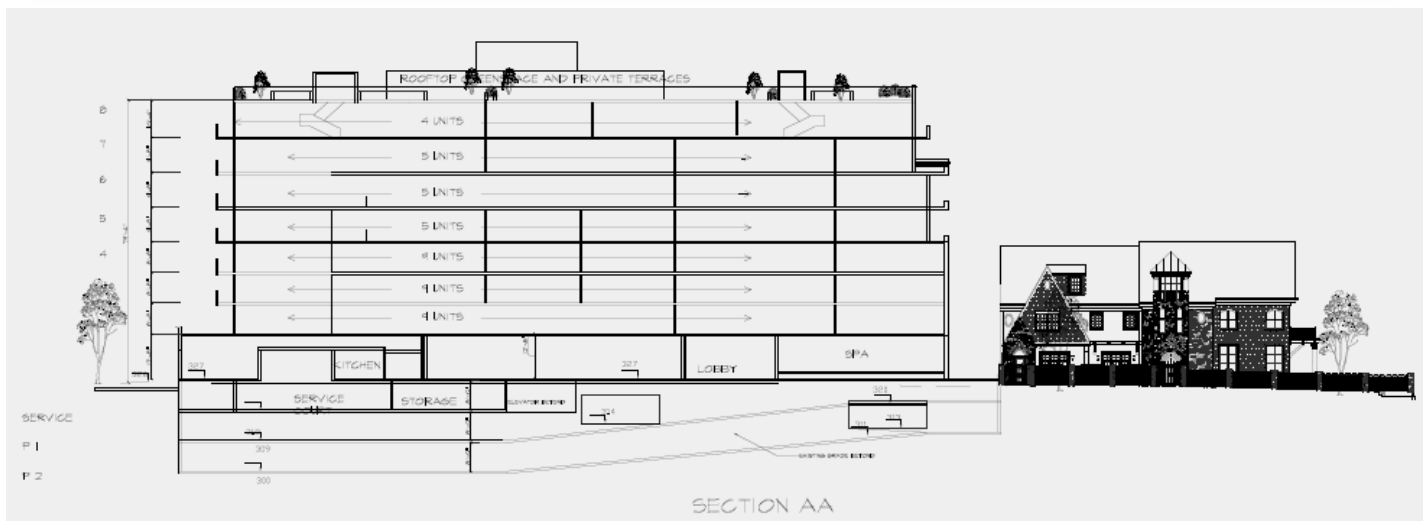
*PD-75 ZONE*DEVELOPMENT STANDARDS TABULATION

<u>ITEMS</u>	<u>CODE REQUIREMENT</u>	<u>PROVIDED</u>
LOT AREA	NO SPECIFICATION	21,101 SQ. FT.
BUILDING COVERAGE	NO MAXIMUM	60.6% (13,710 SQ. FT.)
FRONT SETBACK	0' MIN.	0' ON BATTERY LANE AND WOODMONT AVE
SIDE SETBACK	0' MIN.	11.5' TO WEST
REAR SETBACK	0' MIN.	40.5' FROM EXISTING BLDG AT NORTH PROPERTY LINE
LOT FRONTAGE	0' MIN.	423'
BUILDING HEIGHT	NO MAXIMUM	79'-4"

Additional details of the new development plan are contained in other illustrative diagrammatic exhibits which show elevations (Exhibit 57), the proposed parking facility (Exhibit 59), rooftop open space (Exhibit 58), a typical floor plan (Exhibit 58) and the street level plan, including the planned restaurant (Exhibit 56). Parts of these exhibits are reproduced on the following pages.

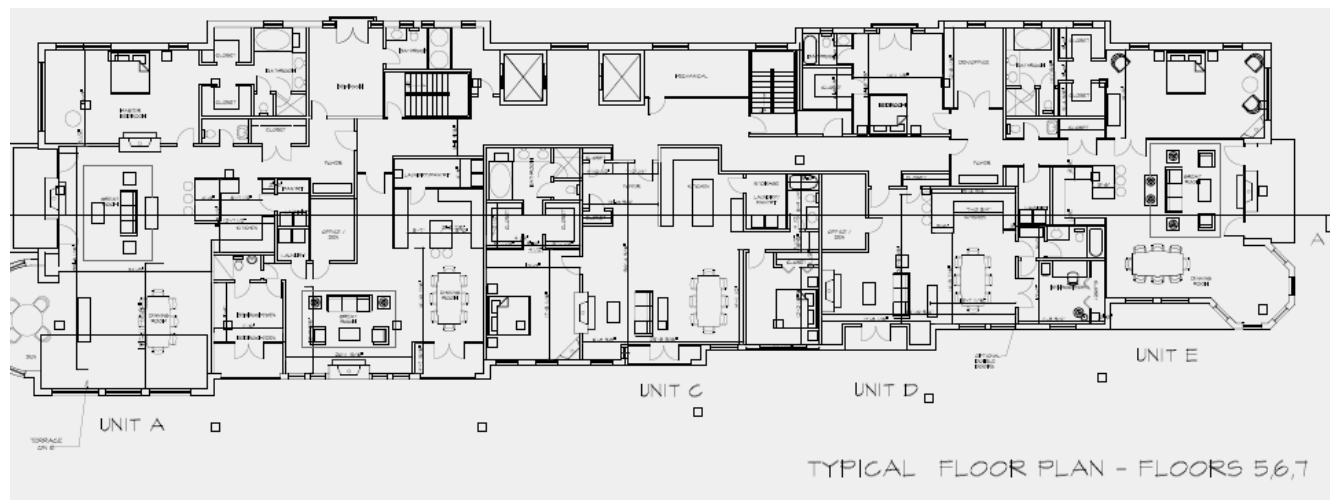
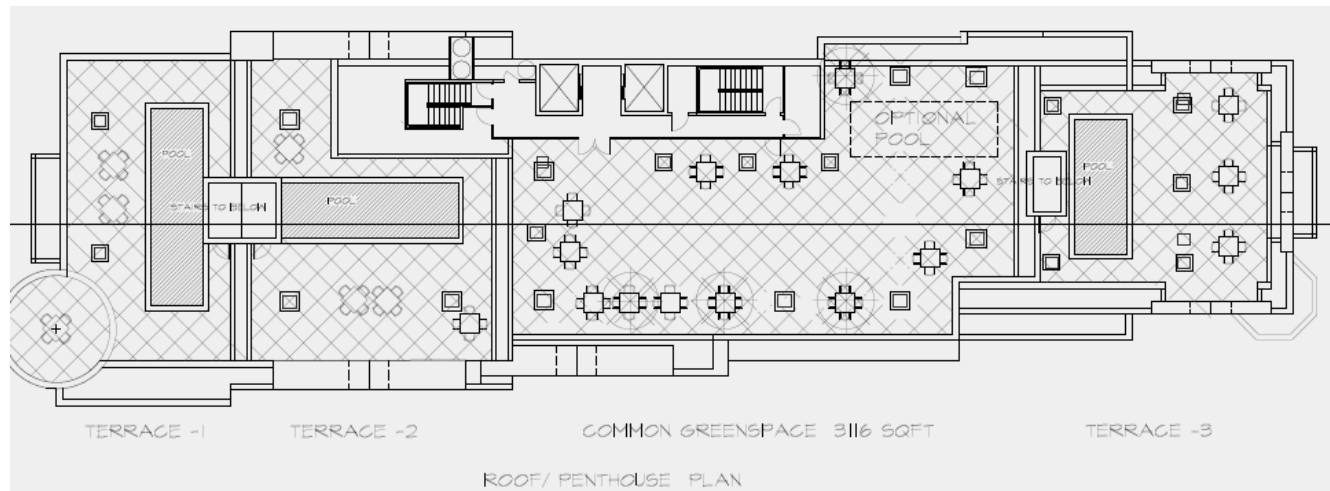


WEST ELEVATION



SECTION AA





3. Public Facilities (Water & Sewer Service, School Capacity, Traffic and Parking)

The County's Annual Growth Policy (AGP) and the Adequate Public Facilities Ordinance (APFO) require a review of the availability of adequate public facilities for any proposed development. Water and sewer service, schools and transportation are discussed individually below.

Technical Staff also notes that there is no evidence that the proposed development would create problems for local fire, police, or health clinics. Exhibit 25, p. 7.

a. Water and Sewer Service

Applicants' civil engineer, David Weber, testified that the improvements proposed in the development plan amendment will be adequately served by public facilities, including water, sewer, drainage and other public works. In his opinion, the development will not cause any adverse impacts on public facilities. 1/29/07 Tr. 107-112. The Technical Staff Report supports this view, indicating that the subject property is served by water and sewer public utilities, and that these facilities have adequate capacity to serve the property (Exhibit 25, p.7).

b. School Capacity

The subject property is located in the Bethesda-Chevy Chase cluster. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School's (MCPS), stated in a letter dated September 29, 2005 (Exhibit 19):

. . . Development Plan Amendment DPA 06-1 . . . would result in a mixed use project that would include 46 multi-family units. Based on average yield factors derived from the Maryland National Capital Park and Planning Commission 2003 Census Update Survey, the impact of this project is estimated to be approximately four (4) elementary, one (1) middle school and one(1) high school students.

This property is located within the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. Enrollment at Bethesda Elementary School currently is within capacity but is projected to slightly exceed capacity in the future. Enrollment at Westland Middle School is currently within capacity, and is projected to stay within capacity, factoring in a six-room addition that is scheduled to open in August 2008. Enrollment at Bethesda-Chevy Chase High School currently exceeds capacity and is projected to continue to exceed capacity, even factoring in a five-room addition that is scheduled to open in August 2009. . . .

The current Annual Growth Policy (AGP) schools test finds capacity adequate in the Bethesda/Chevy Chase cluster.

Thus, MCPS's projection is that the Westland Middle School's enrollment will remain within

capacity, but enrollment at Bethesda Elementary and Bethesda/Chevy Chase High School will be above capacity (although only slightly for the elementary school). Nevertheless, as reported by Mr. Crispell, the AGP schools test finds that capacity is adequate in the cluster, and there is no evidence in the record to the contrary. Moreover, by Mr. Crispell's projection, the proposed development will generate few additional students. Given these projections and the AGP determination that school capacity in the cluster is adequate, the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development.

c. Traffic and Parking

The amount of traffic to be generated by the subject site and the proper manner of determining the required parking became issues in the hearing, mostly because the January 19, 2006, memorandum from Transportation Planning Division (Exhibit 25, Attachment 6) recommended approval, but contained no analysis. The initial projections made by Applicants' traffic engineer, Carl Starkey, (Exhibit 38(d)) also raised questions because he had concluded that the proposed development would result in 31 morning peak-hour trips and 30 evening peak-hour trips, but he had not initially performed a traffic study, as would be required by the Local Area Transportation Review (LATR) standards for this level of trip generation. The Hearing Examiner therefore asked Shahriar Etemadi, M-NCPPC's Transportation Planning Division supervisor, to give testimony at the hearing, which he did (1/29/07 Tr. 54-76; 3/9/07 Tr. 50-83).

Mr. Starkey testified at the first hearing that his initial projection (Exhibit 38(d)) was based on a miscommunication with Applicants. He had thought that they were planning a "high turnover sit down restaurant," when actually they were planning a "quality restaurant." He therefore reevaluated projected traffic at the site, in coordination with Mr. Etemadi. Since the LATR Guidelines do not have trip-generation rates for most types of restaurants, Mr. Starkey used the Institute of Transportation Engineers (ITE) Trip Generation Manual, which is a nationally recognized document for estimating

traffic for project developments. His conclusion from this reevaluation is that a quality restaurant (as defined by the ITE Manual), combined with the residential use would result in a net increase in peak-hour trips below the LATR threshold requiring a traffic study (*i.e.*, below 30). It would result in a net increase of 17 trips in the morning peak hour and 24 in the evening peak hour, utilizing Park and Planning (*i.e.*, LATR) rates for the residential and office space components (the latter to be deducted out because of removal of the existing office building), and utilizing the “quality restaurant” standards from the ITE Manual for the restaurant trips. 1/29/07 Tr. 30-54.

The confusion was further cleared up by the traffic study Mr. Starkey performed between the first and second hearing dates (Exhibit 70(a)). Mr. Starkey assumed worst-case scenarios for trip generation, a “High Turnover Sit Down Restaurant” in the morning peak hour and a “Walk-in Bank” in the evening peak hour, yielding net trip generations for the project of 51 a.m. peak-hour trips and 119 p.m. peak hour trips (Exhibit 70(a), p. 20). He then analyzed the potential impact of these projected tips, combined with existing traffic and background traffic (*i.e.*, traffic expected to be generated by other approved projects already in the pipeline) at five critical intersections: MD 355 at Woodmont Avenue, MD 355 at Battery Lane, MD 187 at Battery Lane, Woodmont Avenue at Battery Lane and Woodmont Avenue at Cordell Avenue. The results, detailed on page 25 of his report (Exhibit 70(a)) show that the permitted critical lane volumes (CLV) of 1600 in Bethesda and 1800 in the central business district (CBD) would not be exceeded (or even closely approached) at any of these intersections.¹⁶ Mr. Starkey also testified to this effect (3/9/07 Tr. 8-23), and Mr. Etemadi endorsed the traffic study in his own testimony. 3/9/07 Tr. 50.

The conclusion is that the traffic study was conducted and prepared based on the LATR guidelines and the scope of work that we have given Mr. Starkey to prepare this study. And the conclusion of the study shows that all impacted intersections are operating within the congestion standard that is established for these areas.

¹⁶ The highest CLV is projected at 1284, for the evening peak hour at MD 187 and Battery Lane.

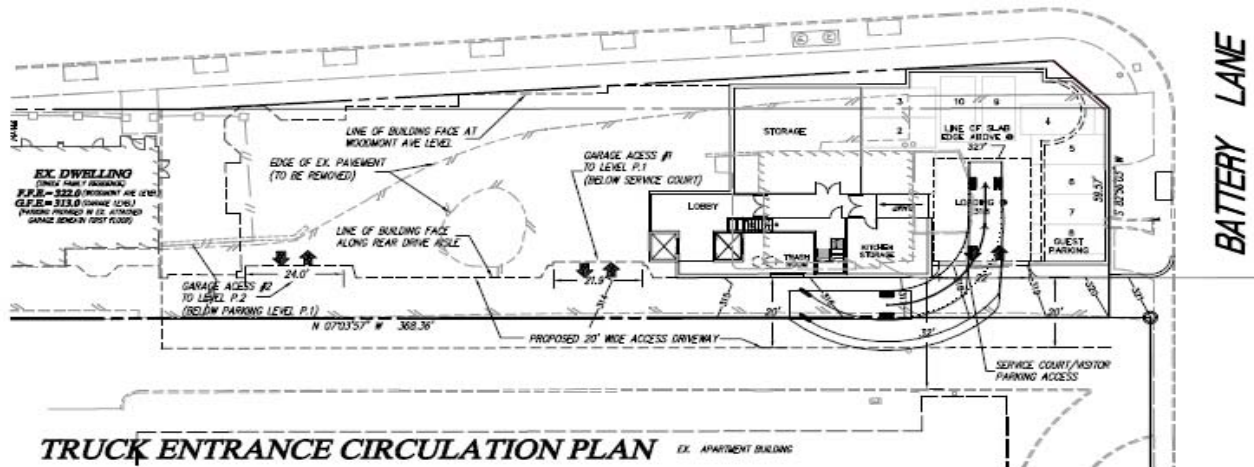
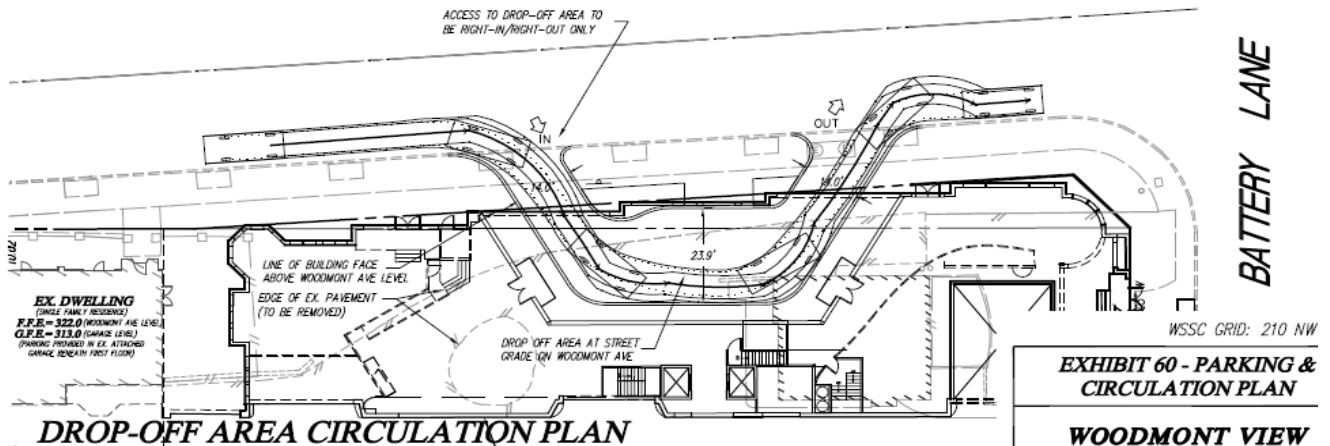
The Hearing Examiner was persuaded by the uncontradicted evidence adduced at the hearing that the proposal will not create problematic traffic volumes. Mr. Etemadi also testified that either version of the language proposed for Textual Binding Element No. 10, that contained in Exhibit 78(b) or that contained in Exhibit 78(c), would insure that anticipated traffic volume stayed within LATR Guidelines. 3/9/07 Tr. 51-52. For the reasons stated in footnote 14 on page 19 of this report, the Hearing Examiner recommends approval of the development plan amendment contained in Exhibit 78(b), which calls for a quality restaurant in the commercial space.

Projected parking for the site in the development plan amendment is also keyed to parking required for a restaurant (in addition to the residential parking to be provided) because, according to Mr. Etemadi, the parking required for a restaurant is greater than other commercial uses of the space under Chapter 59-E of the Zoning Ordinance.¹⁷ 3/9/07 Tr. 64-65 and 70-71. The required parking is reflected in text on the development plan amendment reproduced on page 20 of this report, and was also discussed at the hearing. Eighty-eight (88) parking spaces are required for the site, including both the residential requirements (54 spaces)¹⁸ and commercial requirements (34 spaces). Applicants will provide the required 88 spaces on site in a two-level underground garage (75 spaces); in the service court (11 spaces); and in the exiting garage attached to the Lipnick single-family home (2 spaces). There is also parking available in a nearby public garage located on Woodmont Avenue, and on surrounding streets. 1/29/07 Tr. 127. The Hearing Examiner finds that adequate parking will be provided on site under the recommended amended development plan.

¹⁷ The parking requirements for restaurants are computed in a different manner from parking requirements for office or retail space. *See* Zoning Ordinance §59-E-3.7, which specifies that parking for restaurants is calculated based on floor space devoted to patron use. Office space parking requirements are based on gross floor area and retail parking requirements are based on “gross leasable area;” however, the calculations for restaurants end up requiring more spaces because the Code mandates a much higher number spaces for every square foot of restaurant patron area (*i.e.*, twenty-five parking spaces are required for each 1,000 square feet of restaurant floor area devoted to patron use within the establishment, and 15 parking spaces for each 1,000 square feet of restaurant ground area devoted to patron use on the property outside the establishment.)

¹⁸ The number of residential parking spaces required in this case is reduced by 17% (from 65 to 54) pursuant to Zoning Ordinance §59-E-3.33(b)(3) because Applicants will be providing 17% of their dwelling units as MPDUs.

Applicants also presented evidence that the site will provide safe pedestrian and vehicular circulations systems and points of access. 1/29/07 Tr. 162. A Traffic Circulation Plan was admitted as Exhibit 60, and its function was explained by Applicants' architect, Eric Morrison 1/29/07 Tr. 233-235. Portions of that plan are reproduced below:



4. Environment

Applicants submitted a Natural Resources Inventory and Forest Stand Delineation (#4-02206E), a forest conservation plan exemption and an approved Preliminary Concept Storm Water Management Plan with their rezoning application in LMA G-808. M-NCPPC's Environmental Planning Division, in a memo accompanying the Technical Staff report (Exhibit 25, Attachment 5),

indicates that the site is not located within a special protection area, and there are no forests, specimen trees, streams, stream valley buffers or other natural features on the site. A tree save plan will therefore not be required.

Although the Department of Permitting Services (DPS) approved a Preliminary Concept Storm Water Management Plan on January 15, 2002, for this site, Applicants will have to submit a new concept plan conforming to the new stormwater management law and applicable regulations. They have committed to do so in Textual Binding Element 9, on the face of their amended development plan. Environmental Planning Division suggests in its memo that stormwater management will likely consist of water quality control measures. Applicant's engineer, David Weber, testified that the revised plan will be considerably better in handling stormwater runoff than the current situation on site or the previously approved plan under G-808. 1/29/07 Tr. 118-119.

According to Technical Staff, the existing public storm drain on the adjoining property, contiguous to the subject property, has adequate capacity to take storm water runoff away from the subject property (Exhibit 25, p.7). Technical Staff found that there are no serious environmental issues associated with this application, and the Hearing Examiner agrees.

E. Legal Issues and Community Concerns

Prior to the hearing in this case, there was no opposition to this development plan amendment, according to the Planning Board (Exhibit 33). There was also a letter of support for DPA 06-1 from "Crimson 8400 Bethesda, LLC," the confronting property owner to the east (Exhibits 21 and 31). That letter asserts that the new proposal for a mixed-use, eight-story condominium, would be much more compatible with Crimson's own 200 unit residential property, proposed for the property across Woodmont Avenue, than the initial plan of ten townhouses for the subject site.

Two weeks before the hearing, however, OZAH received a letter from Jim Humphrey, Chair of the Planning and Land Use Committee of the Montgomery County Civic Federation, indicating that he wished to testify challenging the proposed height of this project (Exhibit 39). At the hearing, other legal issues were raised by Mr. Humphrey (Exhibit 46), and the People's Counsel raised an objection to the Alternative Review Committee (ARC) process. 1/29/07 Tr. 17-18. Those issues are discussed below.

1. The Open Meetings Act Objection:

At the beginning of the hearing, Martin Klauber, the People's Counsel, objected to the legality of the process because the ARC, a public body created in Zoning Ordinance §59-D-1.61(a), met to determine the financial feasibility of this project, but allegedly failed to conduct an open and noticed meeting in accordance with the Open Meetings Act, Maryland Code-State Government Article, §§10-501, *et seq.* Mr. Klauber stated that, even though he is a party of record in the case, he was not given notice of the Committee's meeting, and he is not aware of any public notice being issued. 1/29/07 Tr. 17-18. Because this issue was first raised at the OZAH hearing, the Hearing Examiner gave all parties an opportunity to brief the question. Applicants' attorneys filed a brief on February 12, 2007 (Exhibit 69).¹⁹

The Hearing Examiner concluded that the Alternative Review Committee had violated the Open Meetings Act.²⁰ However, the objection was overruled because it had been waived by failure to

¹⁹ Applicants argued, *inter alia*, that the Hearing Examiner does not have the authority to consider the issues of procedural defects and denial of due process raised by Mr. Klauber's objection. The Hearing Examiner ruled that he did have authority to address these issues because the Council must consider these questions when it makes its decision. If there were a blatant violation of due process, the Council is clearly not required to ignore it and await a reversal by the courts. The Hearing Examiner is expressly authorized by Zoning Ordinance §59-H-5.12 to include in his report, "[a]ny other matters of record which, in the opinion of the examiner, are relevant and pertinent for a decision by the district council" Moreover, a Hearing Examiner is always charged with conducting a fair process, and if there are due process problems which impact on the fairness of that process, it is the obligation of the hearing examiner to remedy the problem. *See*, Montgomery County Administrative Procedures Act, Section 2A-1, Declaration of Policy and Legislative Intent.

²⁰ The Hearing Examiner's conclusion was based on the following rationale:

Montgomery County Code Sec. 2-149, which governs "Procedures at meetings," provides:

Unless a committee meeting is subject to Chapter 2A, a meeting may be conducted informally. . . .

Committee meetings must be open to the public in accordance with the state open meetings law.

[Emphasis added]

timely assert it and by failure to exhaust administrative remedies available under the Open Meetings Act. This ruling was also based on the Hearing Examiner's finding that there had been ample notice of the OZAH public hearing, and the presumed failure of notice by the ARC in this case had not resulted in any harm to interested parties, who were free to raise any substantive concerns about the financial evidence considered by the ARC before the Planning Board or at the OZAH hearing. A breach of the Open Meeting Law would be much more consequential if the meeting in question made a final determination of facts in the case; in the DPA process followed in this case (*i.e.*, one with both a Planning Board hearing and an OZAH hearing), it does not. *See* Exhibit 73 for the detailed ruling.

Following issuance of the Hearing Examiner's ruling, Mr. Klauber formally withdraw his objection because he and the other hearing participant, Jim Humphrey of the Civic Federation, had been given access to Applicant's confidential financial documents which were the subject of the ARC proceeding.²¹ Mr. Humphrey also withdrew any objection based on this issue. 2/23/07 Tr. 7-8.

Both from this provision and from the wording of the Open Meetings Act, it appears that the Open Meetings Law applies to ARC committee meetings. Mr. Kaufman, Applicant's attorney, seems to agree in his brief of February 12, 2007; however, Mr. Kaufman suggests that the application of the Open Meetings Law is circumscribed by the provisions of the Maryland Public Information Act, State Government Article, §§10-611 *et seq.* Specifically, §10-616(d) prohibits a records custodian from allowing inspection of a record with confidential commercial or financial information.

Even assuming that is the case (which the Hearing Examiner did not decide), it does not address the issue of the public getting notice of the ARC proceeding and attending that portion of it which would not be confidential (*e.g.*, an expert's projection as to what is the minimum density that would generally be financially feasible on this amount of acreage in this location, irrespective of Applicant's own financial conditions.) Closed sessions of a public body are permitted by §10-508(a)(13) of the Open Meetings Law, *inter alia*, to comply with specific statutory requirements that prevent public disclosures about a particular matter. Section 10-616(d) of the Public Information Act prohibiting disclosure of confidential commercial or financial information may be just such a statutory requirement, but §10-508(d) of the Open Meetings Law requires that certain procedures be followed before a public body may retreat into a closed session, necessitating that there also be an open and public portion of the meeting to accomplish these prerequisites.

Moreover, depending on how the ARC runs its meetings, input from the public might be permitted. For example, a civic association and/or the People's Counsel might have comparative figures which they want the ARC to consider regarding financial feasibility and density in the area of the subject site. The record here does not indicate ARC's procedures in that regard.

The Hearing Examiner believes that the issue of applicability of the Open Meetings law is a serious one which should be considered by the ARC prior to any meetings in other cases.

²¹ Although the Hearing Examiner was orally advised in advance of the likelihood that Mr. Klauber would withdraw his objection, it was necessary to address the issues raised by the objection to determine whether there was a failure of required notice in this case which deprived prospective participants in the process of the opportunity to participate at the ARC stage of the proceedings, and whether any such failure required repeating the ARC process in this case.

2. Sector Plan Height Recommendations:

The major concern of the Montgomery County Civic Federation, as expressed by Mr. Humphrey, is the effort in this case to obtain approval of a building height, 79 feet, 4 inches, which is above the height recommended in the applicable Sector Plan. Mr. Humphrey points out (Exhibit 68) that the *1994 Bethesda CBD Sector Plan* recommends a 65 foot height limit in the Battery Lane District (Figure 3.2 on page 39 of that Plan), and that recommendation was expressly left unchanged by the *2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan* (at page 23). Based on these observations, Mr. Humphrey argues that the subject development, which is located in the Battery Lane District (Block 17 in the 2006 Amendment), must therefore be limited to 65 feet.²²

The Hearing Examiner finds that the 65 foot height limit is recommended for the area, and that one does not have to look back to the 1994 Sector Plan to reach this conclusion, since the same height limit recommendation is specified in the “Proposed Building Heights” diagram on page 12 of the 2006 Amendment. However, the 2006 Amendment also expressly recognizes that recommended height limits may be exceeded to allow the inclusion of MPDUs. As stated on page 10 of the 2006 Amendment,

Mixed-use projects with moderately priced dwelling units (MPDUs) on-site can achieve the greater height and density allowed in the respective zones as specified in this Amendment, but at a FAR no greater than the maximum allowed in the Zoning Ordinance.²³

The almost identical statement can be found on page 21 of the 2006 amendment:

²² In discussing this issue at the hearing, there was also some debate over which Master Plan controlled review of this case, the 1994 Bethesda CBD Sector Plan or the 2006 Woodmont Triangle Amendment. The Hearing Examiner ruled that both the July 1994 Bethesda CBD Sector Plan and the March 2006 Woodmont Triangle Amendment apply, and the latter governs to the extent that there is any conflict between the two. The fact that an additional amendment is planned for the future to discuss housing in the Battery Lane District (page 23 of the 2006 Amendment regarding Block 16, 17, 17.1 and 18) does not mean that the entire 2006 amendment is inapplicable to the Battery Lane District. In fact, the 2006 Amendment specifically includes the old Battery Lane District within the new “Woodmont Triangle Study Area.” See “Study Area Boundary” diagram on page 4 of the 2006 Amendment.

²³ The Zoning Ordinance does not specify a Floor Area Ratio (FAR) limit for this zone.

Mixed-use projects with MPDUs on-site may achieve a greater height and density than allowed in the 1994 Sector Plan as specified in this Amendment, but no greater than the maximum in the Zoning Ordinance.

In fact, the 2006 Plan Amendment encourages inclusion of MPDUs, noting that “Building MPDUs within the study area is a priority for all projects developing under the Optional Method of Development.” 2006 Woodmont Triangle Amendment, p. 11. While this project is not proposed under the “Optional Method of Development,” the policy favoring MPDUs is clear, as it is in the Zoning Ordinance. Interestingly, a “Woodmont Triangle Perspective” contained on pages 6 -7 of the 2006 Woodmont Triangle Amendment (and on its cover) appears to include the structure proposed under this Development Plan Amendment, not the shorter ten-townhouse group approved originally under LMA G-808. The perspective from the Amendment’s cover is shown below:



Section 59-C-7.14(c) of the Zoning Ordinance permits a development in the PD Zone to exceed the density specified for the PD density category (in this case PD-75) “to accommodate the construction of Moderately Priced Dwelling Units.” Code §59-C-7.14(c)(3) requires projects in the

PD Zones with a residential density of more than 28 dwelling units per acre to have a minimum of 12.5% MPDUs.

The Zoning Ordinance also expressly permits additional height and density in proportion to the MPDUs provided on site, as long as the ARC determines, as it has here, that the addition of MPDUs would not be financially feasible within the base limits prescribed by the Zoning Ordinance. Code §59-D-1.61(a). Since Applicants are providing 17% MPDUs, they are permitted by Code §25A-5(c)(3) to obtain a bonus density and height of 22%.²⁴ Applying that bonus percentage to the height and density limits, yields a permitted height of 79.3 feet and a permitted density of 47 dwelling units, exactly what Applicants seek in the subject case.

It is thus apparent that the 65 foot height limit contained in both the 1994 Sector Plan and its 2006 Amendment does not prohibit the 79.3 foot structure proposed here.

3. Continuing Presence of the Existing Single-Family Home:

Another issue raised by Mr. Humphrey is the continued existence of the detached, single-family residence on the property. Mr. Humphrey argues strenuously (Exhibit 71) that it should not be given “nonconforming use” status, and should not be permitted to remain as a detached, single-family residence in the PD-75 Zone. While this issue may have been appropriately argued at the time Applicants were seeking to rezone from the C-T Zone to the PD-75 Zone in LMA G-808, the Council laid the issue to rest when it declared on page 10 of the resolution approving the rezoning,

Pursuant to Code §59-C-7.131, all types of residential uses are permitted in the PD-75 Zone except detached, single-family homes. The existing house on the site is permitted to remain because it predates the rezoning, but it should be considered a nonconforming use subject to the restrictions contained in Zoning Code Division 59-G-4. . . . [Resolution 15-563, March 30, 2004.]

²⁴ MPDUs may not be required if it is determined that the concomitant height and density bonus would significantly reduce neighborhood compatibility or compliance with applicable environmental standards and other regulatory requirements. Code §25A-5(d)(1). The record in this case demonstrates that added height and density would not interfere with any of these standards.

Although Applicants are requesting a change in the parts of the development plan adjacent to the single-family home, they are not requesting to change any aspect of the single-family structure itself or its use. Absent some change in the single-family residence or its use (or evidence of fraud, surprise, mistake, inadvertence, or the like) there would be no basis for the Council to reconsider its determination that the home is a nonconforming use, allowed to continue its existence in the PD-75 Zone. *See, Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962) and *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md. 187, 194-197, 216 A.2d 149 (1966).

IV. SUMMARY OF THE HEARING

Applicants called five witnesses at the hearing, Carl Starkey, an expert in transportation engineering; David Weber, an expert in civil engineering; Kevin Foster, an expert in land planning and zoning; Eric Morrison, an expert in architecture; and Lawrence Lipnick, the managing partner of Battery Lane, LLC, and owner of the subject property. The Hearing Examiner called Shahriar Etemadi, transportation supervisor of M-NCPPC's Transportation Planning Division. Martin Klauber, the People's Counsel, participated but did not call any witnesses. Jim Humphrey, Chair of the Planning and Land Use Committee, Montgomery County Civic Federation, testified against the proposal.

A. Applicants' Case in Chief

1. Carl Starkey (1/29/07 Tr. 30-54; 3/9/07 Tr. 8-49):

Carl Starkey testified as an expert in transportation planning and traffic engineering. On his first day of testimony, he stated that his original submission in this case (Exhibit 38(d)), which projected a net addition of 31 morning peak hour trips and 30 evening peak hour trips was based on a miscommunication with Applicants. He had thought that they were planning a "high turnover sit down restaurant," when actually they were planning a "quality restaurant."

He therefore reevaluated projected traffic at the site, in coordination with Mr. Etemadi. Since the LATR Guidelines do not have trip-generation rates for most types of restaurants, Mr. Starkey used the Institute of Transportation Engineers (ITE) Trip Generation Manual, which is a nationally recognized document for estimating traffic for project developments. His conclusion from this reevaluation is that a quality restaurant (as defined by the ITE Manual), combined with the residential use would result in a net increase in peak-hour trips below the LATR threshold requiring a traffic study (*i.e.*, below 30). It would result in a net increase of 17 peak-hour trips in the morning and 24 in the evening, utilizing Park and Planning (*i.e.*, LATR) rates for the residential and office space components (the latter to be deducted out because of removal of the existing office building), and utilizing the “quality restaurant” standards from the ITE Manual for the restaurant trips.

The details for the a.m. peak-hour trips are: 20 trips generated by the residential units, plus 1 by the restaurant, minus 4 by the office to be removed, equals a net of 17 trips. The details for the p.m. peak-hour trips are: 22 trips by the residents, plus 11 by the restaurant, minus 9 by the office, equals a net of 24 trips.

Mr. Starkey further testified that he looked at the traffic analysis done in 2005 for the development planned at 8400 Wisconsin Avenue, which is immediately across the street from the subject site, and determined that the intersections in the surrounding area all operated with a critical lane volume (CLV) of 1,000 or less, well below the 1,800 critical lane volume threshold for this area. Even if all the trips estimated to be generated by the subject site were directly added to the intersectional CLVs, the result would still be well under 1,800.

Mr. Starkey explained the proposed site access, indicating there is a “right in, right out” access on Woodmont Avenue itself, and an additional driveway entrance on Battery Lane. The access on Woodmont is 40 to 50 feet from the intersection. The drop-off area on Woodmont is recessed so that

stopped cars would not block traffic. As required, 88 parking spaces would be provided on site. The site is not within the parking district, so there would be no parking tax. Restaurant patrons will be able to park in the building or in nearby public parking. Trucks making deliveries would use the Battery Lane driveway access, and very large trucks would back out onto the driveway after making a delivery.

In Mr. Starkey's opinion, there will be no adverse impacts on intersections, and the nearby roads are adequate to serve the proposed development. Moreover, nothing in the proposed development would detrimentally impact the health, enjoyment or general welfare of the public or the surrounding neighborhood.

On his second day of testimony, Mr. Starkey explained his preparation of a traffic study (Exhibit 70(a)) under the supervision of Mr. Etemadi's staff, who outlined the intersections to be analyzed; indicated the background developments to be utilized; and specified trip distribution for those sites to come from the LATR Guidelines. He noted that the analysis overlaps two study areas, the Bethesda CBD and the Bethesda-Chevy Chase policy area. The CLV threshold for the CBD is 1800, and for Bethesda-Chevy Chase, it is 1600.

Five intersections were studied: Old Georgetown Road at Battery Lane; Battery Lane at Woodmont Avenue; Woodmont Avenue at Cordell Avenue; Woodmont Avenue at Wisconsin Avenue; and Wisconsin Avenue at Battery Lane. The traffic study concluded that all the intersections are projected to operate at a level service C or better, with the maximum CLV of 1284, at an intersection where the policy area sets an 1800 maximum. "And in every case all of the CLV values are well below the thresholds." 3/9/07 Tr. 11-12.

The LATR Guidelines (p. 6, Item 1-B) recommends utilizing the Institute of Transportation Engineers Trip Generation Manual for uses that are not specified in the Guidelines themselves. In

doing his study, Mr. Starkey's methodology was to represent the worst case scenario regarding trip generation for the uses permitted under the proposed alternative development plan amendments. He reviewed rates from the LATR guidelines and rates from ITE and considered several different land uses, the first being a quality restaurant, the next being a high turnover sit down restaurant, the third being a walk-in bank, and lastly general retail. Based on this data, as well as existing and background traffic, he concluded that none of the potential uses for the commercial space in the alternative development plan amendments would violate any of the trip generation standards of the LATR.

3/9/07 Tr. 16.

On cross-examination, Mr. Starkey explained how background traffic was determined, so that it could be added into the projected CLV counts at the studied intersections. He also explained the difference between calculating required parking for a restaurant (which uses patron area as the base) and other commercial uses, which look to gross square footage.

2. David Weber (1/29/07 tr. 105-121):

The next witness called by Applicants was David Weber, who testified as an expert in civil engineering. He stated that there is adequate water and sewer service capacity to serve the property, and the existing public storm drain line on the adjoining property, contiguous to the subject property, has adequate capacity to take storm water runoff away. He testified that the improvements in the proposed development plan amendment will be adequately served by public facilities, including water, sewer, sanitary sewer, drainage and other public works. In his opinion, the development will not cause any adverse impacts on public facilities. 1/29/07 Tr. 107-112. In fact, the revised plan will be considerably better in handling stormwater runoff than the current situation on site or the previously approved plan under G-808. 1/29/07 Tr. 118-119. He further opined that the proposed improvements are suitable for a site of this nature in this location.

Mr. Weber further testified that, from a civil engineering standpoint, the planned changes are very minimal. The original storm water management concept was approved on January 14, 2002. When Applicants began to discuss changes, Mr. Weber spoke with Mr. Brush of DPS about the changes. At that point, it was thought that Applicants would not be required to make a new storm water management concept submittal because the hydrology, the amount of impervious area and the amount of pervious area were almost exactly the same in the two applications. Mr. Brush said it would be acceptable if Applicants came in with technical plans when they got to the construction document phase. At a later date, M-NCPPC's Environmental Planning Division indicated that a new stormwater management concept would be required, and Applicants will do so prior to approval of the site plan. Because of advances in technology since the first stormwater management concept was approved in 2002, the new underground facility will be an upgraded, higher performing structure.

Along the western side of the property, there is an existing public storm drain pipe and public sewer line, and an easement for them. The sewer connections will come out of the building and tie into the existing sanitary sewer line. Also in this area, in the approved storm water management concept, the roof drains to the building will tie into a water quality structure somewhere in the northwest corner of the site next to the existing building and then tie into the existing storm drain pipe, again on the western side of the building.

The existing water line that's going to be serving the building is in Battery Lane. There is a house connection for water service that ties into the existing building. There will be a new house connection from the existing water line in Battery Lane to tie into the proposed building.

According to Mr. Weber, there are no changes in the NRIFSD, since all conditions are as they were back in 2002. Applicants also have an exemption from forest conservation regulations, which is still valid.

On cross examination, Mr. Weber indicated that Applicants had received a stormwater management quantity control waiver and a waiver of recharge requirements because the site is in a developed area. Mr. Weber explained that, for properties within the general area of any of the central business districts of the county, standard practice for the Department of Permitting Services is to grant a waiver of quantity type controls, if the site, as it exists, is nearly or completely impervious, such as this site is. He anticipates that the County, as they have done for years, would grant that approval again.

[Applicants agreed to add a textual binding element stipulating that a revised stormwater management concept plan will be submitted and must be approved prior to site plan. It is now Textual Binding Element #9.]

3. Kevin Foster (1/29/07 Tr. 122-203; 2/23/07 Tr. 28-46):

Kevin Foster testified as an expert in land planning and landscape architecture. He described the area around the subject property, and defined the surrounding area as coextensive with the Battery Lane District as set forth in the *July 1994 Bethesda CBD Sector Plan*, indicating it was essentially the same area as defined in LMA G-808. 1/29/07 Tr. 125-128.

Mr. Foster noted that the Battery Lane neighborhood is predominantly an older multi-family neighborhood. He stated that there are quite a number of “mid-rise, low-rise residential apartments” on Battery Lane, all the way to Old Georgetown Road, and there is a commercial area between Woodmont Avenue and Wisconsin that includes an existing hotel, which is the site of the proposed 200 unit condominium building known as 8400 Wisconsin Avenue (*i.e.*, the “Crimson” property). In the block along Wisconsin, south of Battery Lane, there is a combination of residential and commercial office uses. There is also a parking garage on the south side of Battery Lane within this area. 1/29/07 Tr. 127.

Mr. Foster stated that 8400 Wisconsin Avenue, which is directly across Woodmont Avenue from the subject site, will be approximately 100 to 110 feet tall on the Woodmont Avenue side. He used Exhibit 50 to demonstrate the comparative heights of nearby buildings, and noted that the height stepped down from Wisconsin Avenue. 1/29/07 Tr. 130-135. Mr. Foster opined that the proposed development meets the 2006 Sector Plan Amendment recommendation for height step-downs from the core of the CBD (page 8), and follows other sections of the Amendment which talk about increased height in conjunction with MPDUs (pages 10 and 11). 1/29/07 Tr. 135-139.

Mr. Foster noted that the new plat map for the property (Exhibit 52(b)) includes 1,517 square feet of excess right-of-way along Woodmont Avenue acquired by Applicants from the County. He also described the development plan amendment 1/29/07 Tr. 142-143):

On the southern three quarters of the site, in this plan, shown in brown, is the area used for the eight story condominium building. As previously described, the condominium has a driveway access on the east side, parallel to Woodmont Avenue, almost the entire length of the property. It also has a right in, right out drop off along Woodmont Avenue.

There will be a restaurant in . . . the southeastern corner of the property at the corner of Woodmont and Battery Lane. There will be a lobby for the condominium users in the central part of the building located near the drop off. All of the services for the trash and loading will be provided along the driveway that's on the western portion of the site. There is a loading area also inside the building, adjacent to this driveway. There [are] also two access points on this western driveway to get to the two levels of parking in the garage.

* * *

. . . [T]he building consists of 46 condominium units, and . . . on the rooftop, there is also a common green space area . . .

Mr. Foster testified that the green area on the site, including the roof-top green area, would meet the 30% minimum green area required for the PD-75 Zone. He read the definition of “green area” and opined that it needs to be accessible to people who live in and/or use the building, but did not have to be at ground level. He also cited other buildings which were allowed to use rooftop areas to satisfy their green space requirements. 1/29/07 Tr. 144-146.

Mr. Foster described the purpose clause of the PD-75 Zone and testified that, in his opinion, the subject development would satisfy it. 1/29/07 Tr. 149-152. He further opined “that our proposal for a taller building is going to be more compatible with what has now been approved around us than would have been with the townhouse development that was previously approved.” 1/29/07 Tr. 153. He based this opinion on the fact that a 90 to 100 foot building was approved directly across Woodmont Avenue and that the emphasis in the Amended Sector Plan is to increase the density in the Woodmont Triangle. Mr. Foster concluded that the proposed building would be compatible with the existing and future uses that could be built in the surrounding area. 1/29/07 Tr. 154. He further opined that it would not have any detrimental impact on the health, safety, security, morals or general welfare of the residents, the visitors or workers to this particular area, and that this development plan amendment is far superior to the original development plan. 1/29/07 Tr. 154-155.

Mr. Foster testified that the lack of setbacks from Woodmont and Battery Lane is not a problem because the building has architectural features which step back slightly from the street and because Woodmont Triangle is becoming much more of an urban setting than was described in the previous sector plan, “and part of that is really creating that architectural edge and that definition of the street and the [more urban] streetscape.” 1/29/07 Tr. 158. He opined that it would be compatible with the urban style development planned for the area. Under the Sector Plan Amendment (page 12), properties across Battery Lane to the south are recommended for a height of up to 110 feet, which is taller than the structure planned for the subject site. 1/29/07 Tr. 200. Moreover, on Battery Lane, about 1,000 feet to the west of the subject site is another structure, the Whitehall building, that is taller than 70 feet. Further west on Battery Lane are other buildings taller than the one planned for the subject property. 1/29/07 Tr. 189-190.

Mr. Foster further testified that the development will not conflict with the county capital improvements program or other applicable county plans and policies. 1/29/07 Tr. 161. Also, in his

opinion, the proposed amendment complies with the purposes, standards and regulations of the zone and will provide for the maximum safety, convenience and amenities of the proposed residents. He stated that the site will provide safe pedestrian and vehicular circulations systems and points of access. The storm water management and forest conservation requirements on the site will be satisfied, and as the development progresses, Applicants will be providing the condominium association documents that will ensure that all of the open spaces are used for purposes as required under the zone. 1/29/07 Tr. 162-163.

On his second day of testimony (2/23/07 Tr. 28-46), Mr. Foster compared the 1994 Bethesda CBD Sector Plan with the 2006 Woodmont Triangle Amendment. He referenced page 23 of the Amendment, where the Council left height recommendations in the Battery Lane District unchanged, but stated that it intends further amendments to retain or increase housing in the Battery Lane District. Moreover, on page 21 of the amendment, it specifically states that mixed used projects with MPDUs on site may achieve a greater height and density than allowed in the 1994 sector plan, but no greater than the maximum in the Zoning Ordinance. Mr. Foster quoted the Zoning Ordinance as permitting a development plan to exceed height and density specified in the Zone in proportion to the MPDUs built on site, as is the case here.

Mr. Foster also pointed out that the Woodmont Triangle Perspective shown on pages 6-7 of the 2006 Amendment shows a building on the subject site “shaped much like the building we are proposing.” 2/23/07 Tr. 32-33. Almost all the buildings on Battery Lane are multi-family structures. The only townhouses that are anywhere near this property are at the very far end of Battery Lane adjacent to the single family neighborhood. 2/23/07 Tr. 37.

Mr. Foster observed that the PD Zone generally contemplated larger tracts than the subject site, but also intended to allow flexibility for projects of varying size and in different settings. One must

therefore apply elements of the purpose clause of the Zone with that in mind. In his opinion, this project complies with the purpose clause. 2/23/07 Tr. 41-42.

4. Eric Morrison (1/29/07 Tr. 205-241):

Eric Morrison was called by Applicants as an expert in architecture and urban design. Mr. Morrison explained how two tall buildings frame a street, in this case the northern entrance to Bethesda, and form a “gateway.” He produced a rendered ground floor plan and elevations (Exhibit 56) to illustrate his vision of the building he designed. He views it as “more of a streetscape as opposed to a 200-foot-long monoblock.” 1/29/07 Tr. 211.

Mr. Morrison made portions of the ground floor “see-thru,” and he has used interesting roof shapes to make the structure appear as several buildings grouped together. To the north, a corner element on the northeast corner is part of the gateway, “setting back and stepping along Battery Lane together with that angled property line.” 1/29/07 Tr. 218-219. Rather than setbacks at the street level, a 15 foot wide sidewalk will be provided, which is much wider than exists. Elements of both the public right-of-way and the private right-of-way combine to make a streetscape which is far larger than what is there today. Along Battery Lane, levels one through eight of the building are stepped back substantially in accordance with the Master Plan’s discussion for Battery Lane. 1/29/07 Tr. 220-221. There is a cutout on the ground floor for dropping off passengers along Woodmont Avenue, which extends up only one story.

Mr. Morrison further testified that in order to provide MPDUs, Applicants needed the additional amount of space provided by the greater density and height. 1/29/07 Tr. 228-229. He believes this development, including the added housing, the MPDUs, the improved streetscape and the small retail space (restaurant),²⁵ would fulfill goals of the Master Plan. 1/29/07 Tr. 226-229. He noted

²⁵ When asked by the Hearing Examiner at this point whether there were plans for commercial uses other than a restaurant, Applicants’ counsel replied “To my knowledge it is not suggested. I don’t -- it is not being -- we are not proposing a different use than a restaurant. If we did we’d have to come and get an amendment.” 1/29/07 Tr. 230.

that he was also able to place the parking in subterranean levels, which is a goal of the Master Plan. The two underground parking levels are not connected inside and function autonomously. Mr. Foster introduced Exhibit 59, Illustrative Parking Plans and Exhibit 60, the Traffic Circulation Plan, and explained how they work. 1/29/07 Tr. 233-235.

5. Laurence Lipnick (1/29/07 Tr. 241-250):

Applicants' final witness was Laurence Lipnick, the managing partner of Battery Lane, LLC, and the owner of the subject property and the improvements on it (the office building on the south end and the single family home on the north end). Mr. Lipnick testified as to why he wanted to build the proposed development, and the goals he sought to achieve. These included a mix of uses and affordable housing units. He found that he could not afford to do so within the 65 foot height restriction, so he applied to the County for additional height. In support, he presented detailed financial information.

Mr. Lipnick promised to abide by all the binding elements in the case.

B. Government Witness

Shahriar Etemadi (1/29/07 Tr. 54-76; 3/9/07 Tr. 50-83):

Shahriar Etemadi, Transportation Supervisor of M-NCPPC's Transportation Planning Division, testified at the Hearing Examiner's request. On his first day of testimony, Mr. Etemadi explained that the cryptic January 19, 2006, memorandum from Transportation Planning Division (Exhibit 25, Attachment 6) resulted from two errors by his Division, assuming incorrectly that the subject site was within the CBD and that it would be totally residential.

He then confirmed the trip generation numbers testified to by Mr. Starkey for a development with this number of dwelling units and a "quality restaurant," but no office (*i.e.*, a net increase of 17 peak-hour trips in the morning and 24 in the evening). He also indicated that with this particular type

of restaurant, there is no trip generation rate in the LATR guidelines, so the ITE trip generation manual is used.

Mr. Etemadi further testified that his reviews are based on the use the developers tell him they plan to install, not on a worst case scenario. If a high turnover restaurant, rather than a quality restaurant, were constructed on this site, a traffic study would be required. However, he believes that even with a high turnover restaurant, service at the nearby intersections should be well within acceptable range.

On his second day of testimony, Mr. Etemadi testified that the traffic study conducted by Mr. Starkey after the first day of hearing (Exhibit 70(a)) was prepared based on the LATR guidelines and the scope of work that he had given Mr. Starkey. The conclusion of the study shows that all impacted intersections are operating within the congestion standard that is established for these areas. "So it passes the LATR." 3/9/07 Tr. 50-51.

Mr. Etemadi indicated that the alternative versions of Textual Binding Element #10 in both alternative development plans, Exhibits 78(b) and 78(c), were sufficiently clear to be enforced by M-NCPPC.

On cross-examination, Mr. Etemadi testified that the jobs proposed to be relocated to the National Medical Center site from the base realignment closing were not included in background traffic data for this traffic study for a number of reasons. The number of jobs involved keeps fluctuating; the plan for the relocation is not yet in place; the affected area is not close to the intersections involved in this traffic study; and anticipated traffic from the relocation would likely come from the Beltway, to north of National Medical Center, not through intersections to the south.

According to Mr. Etemadi, the number of parking spaces provided for the commercial portion of the proposed development plan amendment (*i.e.*, 34 spaces), which is based on the requirements for a restaurant, is the highest number of spaces that would be required for any retail use. 3/9/07 Tr. 64-65.

Mr. Etemadi further testified that the cutout in the building on the Woodmont Avenue side to allow drop-off of passengers is a safe and efficient arrangement. The CLV measurements at the intersection of Battery Lane and Woodmont indicate that there is no traffic backup on Woodmont which would interfere with access to the subject site. In his opinion, the entry/exit points are safe and efficient. 3/9/07 Tr. 79-80.

C. Community Witness

Jim Humphrey, on behalf of MCCF (1/29/07 Tr. 76-105; 3/9/07 Tr. 90-97)

Jim Humphrey testified on behalf of the Montgomery County Civic Federation. His first point was to challenge the “nonconforming use” status of the existing, detached, single-family home on the subject site. He argued that new construction of dwelling units in the C-T zone (the Zone of this site prior to its rezoning to PD-75 in G-808) is not an allowed use under Code Section 59-C-4.3. This house was built in 2002, 13 years after the C-T zone was applied. A necessary condition for permitting the new residential use in the C-T Zone is that there must have been an existing house on the property when it was rezoned in 1989 to the C-T zone. Although a single-family residence had existed on the property when the property was rezoned from R-60 to C-T in 1989, that structure had been converted to commercial use, according to Mr. Humphrey. Mr. Humphrey argues that the prior existence of another home on the property is not sufficient to have permitted construction of the present single-family home while it was in the C-T Zone.²⁶

Mr. Humphrey indicated that the primary concern of the Civic Federation “is adherence to master plans in the county.” 3/9/07 Tr. 90-94. MCCF is concerned any time a development deviates

²⁶ Applicants’ attorney objected to this testimony about the single-family residence because he had not been given notice of it in advance and because the property is no longer in the C-T Zone. Moreover, he observed that Zoning Ordinance §59-C-4.2, at note 6, permits residences, or a combination of residential and general offices in the C-T Zone, if a residence was lawfully existing at the time the property was reclassified to the C-T zone. The Hearing Examiner overruled the notice objection because there would be another day of hearing, giving Applicants’ counsel an opportunity to reply. As to the merits of Mr. Humphrey’s argument on this point, the Hearing Examiner ruled that the argument was precluded by the Council’s express determination in the rezoning to PD-75 that the single-family home was to be considered a nonconforming use. See Part III. E. 3 of this report.

from what is allowed or recommended in the master plan. In this instance it is particularly concerned because this would be a Planned Development Zone property, and the Planned Development Zone has no height limit, *per se*. The heights are ordinarily assigned from the applicable master plan. For this property, the height assigned should properly be 65 feet, even though the subsequent amendment regarding MPDUs allows the height and density to be exceeded, because there is site-specific language on page 92 of the 1994 Bethesda CBD Sector Plan recommending that the height be kept to 65 feet and that it be stepped back from Woodmont Avenue to avoid a “canyon effect.” Height and density are issues that should have a degree of reliability, and this development plan amendment does not afford people who read the Sector Plan the reliability that MCCF believes they should expect. Mr. Humphrey believes that the Council resolution amending the Sector Plan and the language of the Amendment itself indicate that the height limit of 65 feet for this property was to be left unchanged.

Mr. Humphrey noted that there is an additional concern about compatibility with the single-family detached home that already exists on this property. In his opinion, the three-story tall town houses that were proposed originally were more compatible than the current proposal.

Mr. Humphrey also expressed concern that the traffic study did not include, in background traffic, the 2300 jobs coming to National Naval Medical Center in Bethesda through the “BRAC realignment,” which will greatly impact the nearby intersection. He also questioned the safety and efficiency of the shared driveway to the west of the site.

D. People’s Counsel

At the beginning of the hearing, Martin Klauber, the People’s Counsel, objected to the legality of the process because the ARC, a public body created in Zoning Ordinance §59-D-1.61(a), met to determine the financial feasibility of this project, but allegedly failed to conduct an open and noticed meeting in accordance with the Open Meetings Act, Maryland Code-State Government Article, §§10-501, *et seq.* Mr. Klauber stated that, even though he is a party of record in the case, he was not given

notice of the Committee's meeting, and he is not aware of any public notice being issued. 1/29/07 Tr. 17-18. [Because this issue was first raised at the OZAH hearing, the Hearing Examiner gave all parties an opportunity to brief the question, and the objection was overruled in an order issued prior to the second hearing date (Exhibit 73 and Part III.E.1 of this report).]

At the second hearing, Mr. Klauber formally withdraw his objection because he and the other hearing participant, Jim Humphrey of the Civic Federation, had been given access to Applicants' confidential financial documents which were the subject of the ARC proceeding. Mr. Humphrey also withdrew any objection based on this issue. 2/23/07 Tr. 7-8.

On the final hearing date, Mr. Klauber announced that "the Office of the People's Counsel is in neither in support of [n]or in opposition to this application." 3/9/07 Tr. 86. Mr. Klauber added that "the preference of the Office of the People's Counsel is to have a really good restaurant . . . on the ground floor level at this location," as had been suggested in the Applicants' evidence. 3/9/07 Tr. 87-88. Mr. Klauber argued that such a quality restaurant would be a benefit to the residents on both sides of Battery Lane, and there are many residents able to walk to a nice restaurant in their neighborhood.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standards for Council Review

Sections 59-D-1.61 and 59-D-1.7 of the Zoning Ordinance require the District Council, before it approves any application for re-zoning to a Planned Development (PD) Zone or an amendment to a previously approved development plan in a PD Zone, to consider whether the application, including the development plan, fulfils the "purposes and requirements" set forth in Code Section 59-C for the PD zone.²⁷ In making this determination, the law expressly requires the District Council to make five

²⁷ As mentioned previously in this report, the standards for review of a proposed development plan amendment are similar to those for a rezoning application, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record "in the same manner as the record is compiled for a local map amendment application."

specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation.

The five specific findings required by §59-D-1.61 the Zoning Code are:

(a) *T[hat t]he zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. [The remainder of this section establishes the alternative review committee and specifies the manner in which it reviews requests for bonus density and height, when MPDUs are provided on site. For the sake of brevity in the main text, it is quoted in a footnote, below]*²⁸

(b) *That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

(d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

²⁸ The following “ARC” procedure was added to Finding (a) by a Zoning Text Amendment:

However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if a majority of an Alternative Review Committee composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees, find that a development that includes all required MPDUs on site, including any bonus density units, would not be financially feasible within the constraints of any applicable density or height limit. If the Committee finds that the development would not be financially feasible, the Planning Board must recommend to the District Council which if any of the following measures authorized by Chapter 59 or Chapter 50 should be approved to assure the construction of all required MPDUs on site:

- (1) exceeding an applicable height limit, lower than the maximum height in the zone, that was recommended in a master plan or sector plan,*
- (2) exceeding an applicable residential density limit, lower than the maximum density in the zone, that was recommended in a master plan or sector plan, or*
- (3) locating any required public use space off-site.*

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The “Required Findings” in the next part of this Report and Recommendation are organized in the order set forth in the statute to facilitate review.

B. Required Findings

1. County Plans and Policies

The first required finding is:

[That t]he zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies . . . [The remainder of this provision permits a project to exceed the height and density recommendations of a Sector Plan if an Alternative Review Committee (ARC) finds that it is not “financially feasible” to meet those recommendations because of the inclusion of MPDUs in the project. In such a case, the Planning Board may recommend permitting a height and density greater than recommended in the Sector Plan.]

a. The Applicable Master Plan or Sector Plan

There are two applicable Master Plan documents, the *July 1994 Bethesda CBD Sector Plan*, and the *March 2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan*. As discussed in Part III.E.2. of this report, the Hearing Examiner finds that the proposed height of the project does not render it noncompliant with the Sector Plan, as amended, because the 2006 Amendment expressly approves the addition of bonus height and density to encourage on-site MPDUs.

As further specified in Code §59-D-1.61(a), the ARC reviewed the application and determined that the project would not be financially feasible absent the bonus height and density sought by Applicants. *See* ARC findings attached to the Amended Technical Staff Report (Exhibit 32, Attachment 1). The Planning Board thereafter recommended approval of the new development plan with height and density above the base height recommended in the applicable Sector Plan. After considering an objection to the proceedings conducted by the ARC, the Hearing Examiner concluded, for the reasons set forth in Part III. E.1. of this report, that there was no prejudice to interested parties as a result of a procedural defect in the ARC process (*i.e.*, failure to comply with the Maryland Open Meetings Act).

Other aspects of Master Plan Compliance were discussed by Technical Staff in their initial report (Exhibit 25) and in the January 10, 2006 analysis of M-NCPPC's Community-Based Planning Division (Exhibit 25, Attachment 4), a portion of which is quoted below:

. . . The current proposal meets several of the objections and recommendations of the 1994 Sector Plan in that it increases the amount of housing near Metro and helps provide a northern gateway to the Woodmont Triangle. Together with the proposed development across Woodmont Avenue, the 8400 Wisconsin project [earlier referred to herein as the "Crimson 8400 Bethesda" property], two high-rise residential developments would frame the northern entrance to Bethesda along Woodmont Avenue. The proposal provides eight moderately priced dwelling units on site, adding to the 25 proffered by the 8400 Wisconsin Avenue project, and furthering one of the main goals of the Woodmont Triangle Amendment to the 1994 Sector Plan.

As noted by Technical Staff (Exhibit 25, p. 6), the proposal also conforms to many of the urban design guidelines in the Sector Plan (pp. 92-94), including streetscape development, building orientation towards both Woodmont Avenue and Battery Lane, vehicular access and hidden underground off-street parking. “The proposal offers architectural features, including rooflines that are compatible with adjacent development and the existing dwelling on the property[, and it] will result in a distinctive visual character and identity called for in the purpose clause of the zone. . . .”

Technical Staff observes that the newly proposed building exceeds the 1994 Sector Plan’s height recommendation, but concludes that “the building height provided will be compatible with adjacent development and will integrate mutually compatible uses,” because “[t]he proposed height is higher than adjacent mid-rise residential development to the west, but it is lower than adjacent residential development at 8400 Wisconsin Avenue, which is 100 feet.” Also, “[t]he residential use is consistent with existing and planned land use in the surrounding area . . . [and t]he commercial use . . . [will] fit into the fabric of the urban environment of the Bethesda CBD.”

Although the proposed front building setbacks do not conform to setbacks currently existing on Battery Lane, the PD-75 Zone contains no standards for building setbacks, and Community-Based Planning Division does not recommend attempting to match the existing 40-foot setbacks found in other properties on that street, which it characterized as “not consistent with the urban character developing in the Woodmont Triangle or the PD-75 zoning of this small site.” As stated in its memo:

The applicant will provide landscaping on the site but cannot set the proposed building back 40 feet. The building will be arranged to provide a gateway along Woodmont Avenue. The north entrance to the Woodmont Triangle begins with the sweep of the National Institutes of Health’s green space along Woodmont Avenue and will be framed by the two new residential projects and new streetscape. This will be a significant improvement over the current entrance marked by an old parking structure, one large single-family home and a three-story office building with head-in parking. The sidewalks on both sides of Woodmont Avenue will be developed with the Bethesda streetscape.

It is clear from the language used by Community-Based Planning Division, that it does not believe the higher proposed building will create the “canyon effect” disparaged in the 1994 Sector Plan (p. 92) and mentioned by Mr. Humphrey in his testimony. Instead, Community-Based Planning Division feels that the newly proposed building, in combination with its 100 foot tall neighbor approved for construction across Woodmont Avenue, would create a “frame” or “gateway” for the entrance to Bethesda. Moreover, as pointed out by the building’s architect, Eric Morrison, the building was designed to avoid a monolithic appearance. To this end, there are varying roof lines, step-backs for upper floors and wide sidewalks. 1/29/07 Tr. 211-221. The Land Use Maps on page 27 of the 2006 Amendment propose a land use of “High-rise or Garden Apartments” for the subject site, and it therefore appears that the Sector Plan Amendment did not intend to preclude an eight-story residential building on the site, as long as it qualified for the bonus height by the inclusion on-site MPDUs.

Community-Based Planning Division also concluded that the Council’s expressed intention to further amend its plan for the Battery Lane District in the future (2006 Amendment, p. 23, regarding “Blocks 16, 17, 17.1 and 18”) “does not have a negative bearing on this property” because the Council's main concern was to retain and attract affordable housing in the area, and this project, by providing affordable housing, is in accord with that intent.²⁹

Technical Staff also discusses the proposed commercial development (Exhibit 25, p. 7):

²⁹ Community-Based Planning Division pointed out that one potentially adverse impact of the new development plan would be to cut off some sunlight to the Lipnick single-family residence on the site. The Hearing Examiner notes that this is not an issue of “compatibility” with adjacent or surrounding development because the Lipnick residence is on the site itself. Nevertheless, Zoning Ordinance §59-C-7.15 also requires that the proposed development “be compatible with the other uses proposed for the planned development.” The Hearing Examiner finds that, although it is not ideal to have a detached, single-family residence adjacent to an eight-story condominium, this is an unusual case where the owner of the subject site and co-applicant in this case lives in the single-family residence in question. If he later seeks to sell the single-family home, any prospective buyer will be able to see that there is a bigger building on the property. Community-Based Planning Division noted that the additional structure would also bring some benefits to the single-family house, in that the new building would partially block vehicle noise from Battery Lane and would provide an improvement to the visual character of the site. As stated elsewhere, the architecture planned for the new building will also mesh nicely with the existing building. Considering all these factors, the Hearing Examiner finds that the new building proposed by Mr. Lipnick will be compatible with his existing home.

A small amount of commercial space is present in the application. Although commercial uses in this location are not recommended in the Sector Plan, the District Council may permit commercial uses in the PD-75 Zone. Staff believes that the small amount of commercial space in the proposal will not adversely affect the surrounding land uses and will be compatible with the proposal and surrounding development and encourage a maximum of social and community interaction and activity described in the purpose clause of the PD-75 zone.

Technical Staff's analysis in this regard predated the 2006 Woodmont Triangle Amendment, which in fact encourages street level commercial space, as is planned here. The "Highlights" page of the 2006 Amendment includes a bullet point announcing that the Amendment "Encourages the location of first-floor retail." 2006 Amendment, p. 8. This sentiment is reiterated more explicitly in one of the "Urban Design Guidelines" on page 15 of the Plan Amendment, which recommends that developments:

- Provide street-oriented retail, restaurants, and other street animating uses on the first floor of buildings located along streets such as Norfolk Avenue and Cordell Avenue.

Thus, the inclusion of a street-level restaurant, as planned for the eight-story building in this case, is perfectly consistent with the amended Sector Plan.

The testimony of Applicants' land use expert, Kevin Foster, is also consistent with the opinions expressed by Technical Staff and Community-Based Planning Division in support of this application. Based on this record, the Hearing Examiner concludes that the new development plan will be in substantial compliance with the amended Bethesda CBD Sector Plan, as "Finding (a)" requires.

b. The General Plan and the County Capital Improvements Program

The General Plan "stresses the desirability of mixed uses" and "encourages housing plans that foster transit serviceability and proximity of affordable housing to transit." General Plan Refinement, Approved and Adopted 1993, p. 53. This Application places a mixed-use development close to a Metro station, in an area which has mostly light commercial and apartment building uses. Moreover, Applicants' land use expert, Kevin Foster, testified that the development will not conflict with the

county capital improvements program or other applicable county plans and policies. 1/29/07 Tr. 161. There is no evidence in the record to contradict that conclusion, and the hearing examiner finds that the requested rezoning does not conflict with the general plan or the county capital improvements program.

c. Other County Policies (Annual Growth Policy and Adequate Public Facilities Ordinance)

The County's Annual Growth Policy (AGP) and the Adequate Public Facilities Ordinance (APFO) provide for a review of the availability of adequate public facilities for any proposed development. The public facilities included are police, fire, health, water and sewer, schools and transportation. As discussed in Part III. D. 3. of this report, adequate public facilities for water, sewer, schools and transportation are available for this development.

Under the FY 2007 AGP (p.14), "[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." There is no such evidence in this case.

Based on this record, the Hearing Examiner finds that the proposed development, under the requested development plan amendment, will be served by adequate public facilities and does not conflict with "other applicable county plans and policies."

2. Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility with Adjacent Development

The second required finding is:

That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

a. Compliance with Zone Purposes, Standards and Regulations

The requirements for the PD-75 Zone are found in Code §59-C-7.1. The PD-75 Zone is a “floating zone,” which is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-specific criteria, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications must be spelled out on a development plan, however, to assure appropriate zoning oversight by the District Council. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones.

i. Purposes of the PD-75 Zone

The purpose clause for the PD-75 Zone (as well as the other PD Zones) is found in Code §59-C-7.11. It is set forth in full below, with relevant analysis and conclusions following.

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual

character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

As discussed in Part V.B.1.a., above, the proposed development will be in substantial compliance with the *Bethesda CBD Sector Plan, as Amended*. Accordingly, the application will

comply with the first element of the purpose clause by allowing implementation of applicable Master Plan objectives. However, the small size of the intended development makes it virtually impossible for the builder to satisfy each element of the purpose clause unless one evaluates this development as part of the larger neighborhood.

Typically, developments in the PD Zone are, as mentioned in the “purpose clause,” large in scale, a characteristic which enables the developer to employ the kinds of pedestrian circulation networks, open spaces and recreational areas which are goals of the Zone. The small size of this project limits the use of extensive common areas and pedestrian circulation networks. Nevertheless, Zoning Code §59-C-7.122 does recognize that a PD Zone may be applied to small developments, and this project’s location near the heart of Bethesda allows it to achieve the PD Zone’s social interaction goals in the context of the surrounding area. The development will be close enough for people to walk to nearby restaurants, shops and entertainment.

Moreover, the new development plan calls for a much larger project than originally planned (*i.e.* the original plan called for 10 townhouses, while the plan amendment would allow a 46 unit building to be added to the site). The additional size allows Applicants to supply additional amenities, such as a restaurant and roof-top common areas. Thus, the present application is more in keeping with the purposes of the PD-75 Zone than the original proposal approved by the Council in LMA G-808. More importantly, it will provide a diversity of housing types, called for in the “purposes” clause, but not provided under the G-808 townhouse plan.

Visually, the planned structure will be an infinite improvement over the present office building and gravel parking lot. As noted by the Technical Staff, the new building will front on both Woodmont Avenue and Battery Lane to activate the streetscape. As is evident from the illustrative elevations reproduced on page 16 of this report, the architecture was designed to blend well with the existing single-family home on the site, and will provide an interesting gateway to Bethesda from the north.

In addition, the proposed development would provide the “maximum of safety, convenience and amenity” for both the residents and their neighbors, another stated purpose of the PD Zone. The units will have safe vehicular access via the recessed drop-off area on Woodmont Avenue and the existing single driveway on Battery Lane. Parking will be in an underground garage, except for the service court and the existing two-car garage attached to the Lipnick residence. The uncontradicted record in this case establishes that vehicular and pedestrian access and circulation will be safe and efficient. See Part III.D.3.c. of this report. Moreover, living within easy walking distance of a Metro station and having the numerous Bethesda retail establishments as well as the Battery Lane Local Park in the neighborhood will be great conveniences. Residents and the public will also benefit from the 30% green area proposed for this project, although the roof-top green space will not be available to the general public.³⁰

The objective of compatibility was discussed at length in connection with the issue of Master Plan compliance in Part V.B.1.a. of this report. The goal of visual compatibility will be achieved by designing the proposed building to mesh architecturally with the existing large single-family home, as mentioned above, and by the similarity of the proposed eight-story building to other structures existing and planned in the surrounding area. In fact, the new development plan calls for a structure that is more in keeping with its surrounding area than the townhouse proposal approved in G-808. Land use compatibility is provided by the fact that the proposed residential use fits in well both with the nearby residential uses and with the variety of local amenities available in Bethesda within walking distance. It is also consistent with the Land Use Plan provided on page 27 of the 2006 Woodmont Triangle Amendment.

³⁰ Applicants’ land use planner, Kevin Foster, opined that “green space” needs to be accessible to people who live in and/or use the building, but did not have to be at ground level. He also cited other buildings which were allowed to use rooftop areas to satisfy their green space requirements. 1/29/07 Tr. 144-146.

In sum, the proposed development is consistent with the intent and purposes of the PD-75 Zone. We next look to the “standards and regulations” of the PD-75 Zone.

ii. Standards and Regulations of the PD-75 Zone

The standards and regulations of the PD-75 Zone are spelled out in Code Sections 59-C-7.12 through 7.18.

Section 59-C-7.121, Master Plan

Pursuant to Code §59-C-7.121, “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher.” No reclassification is sought in this application, and this section is therefore inapplicable.

Section 59-C-7.122, Minimum Area

Code §59-C-7.122 specifies, “No land can be classified in the planned development zone unless the district council finds that [certain criteria are satisfied].” This section is also inapplicable because no reclassification is sought in this application.

Section 59-C-7.13 and 7.131, Residential Uses Permitted

Pursuant to Code §59-C-7.131, all types of residential uses are permitted in the PD-75 Zone except detached, single-family homes. The existing detached, single-family house on the site is permitted to remain because it predates the rezoning, and the Council has determined that it is a nonconforming use subject to the restrictions contained in Zoning Code Division 59-G-4, as discussed in Part III. E. 3 of this report.

Section 59-C-7.132(b), Commercial Uses Permitted

Section 59-C-7.132(b), provides:

- (b) *Commercial and industrial uses may be permitted in addition to the local commercial facilities permitted under paragraph (a) above, if any, subject to the following conditions:*
- (1) *That such uses are proposed by the appropriate master plan to be located within the area covered by the planned development zone.*
 - (2) *That such uses are so designed and located as to achieve the purposes of the planned development zone and to be compatible with other uses within and adjacent to the development.*

Applicants seek to include a small amount of restaurant commercial space (3200 square feet of gross floor area) on the first floor of their proposed eight-story building. The Hearing Examiner finds that such commercial space is permitted under Section 59-C-7.132(b) because the Bethesda CBD Sector Plan endorses such uses for the area, as discussed in Part V.B.1.a. of this report. Moreover, this application also satisfies the alternative prong of this section because a restaurant use would achieve the purpose of the zone by adding an additional and compatible amenity.

Section 59-C-7.14, Density of Residential Development

Section 59-C-7.14 determines the appropriate density category for the zone when reclassification is sought. That is not the case here, so this section is inapplicable..

Section 59-C-7.15, Compatibility

Section 59-C-7.15(a) provides:

All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.

Compatibility has already been discussed extensively in connection with Master Plan compliance (pp. 52-55 of this report) and satisfaction of the purpose clause of the PD-75 Zone (p. 60 of this report). As is evident from Sector Plan Amendment's Woodmont Triangle Perspective, reproduced on page 33 of this report, the bulk of the proposed structure will not be out of keeping with the bulk of nearby existing and proposed development.

The same should be said about height compatibility: the adjacent building to the west is four to five stories tall; other buildings further to the west are taller than building proposed for the subject site (1/29/07 Tr. 189-190); the building approved to the east, across Woodmont Avenue, will be 100 feet tall; the Amended Sector Plan allows heights up to 110 feet directly across Battery Lane to the south (Diagram on Page 12 of the Sector Plan Amendment); and the property to the north is NIH, an institutional use with large buildings.

The proposed use of the subject site as a mixed-use, multi-family dwelling is also consistent with the planned use across Woodmont Avenue and with the other existing uses on Battery Lane, almost all of which are multi-family structures. 2/23/07 Tr. 37. Finally, as pointed out by Applicants' land planner, Kevin Foster, the proposed building is compatible with the more urban style of development that is planned for the Woodmont Triangle area under the Sector Plan Amendment. 1/29/07 Tr. 158.

The Hearing Examiner is in agreement with the assessment of "Crimson 8400 Bethesda, LLC," the confronting property owner to the east (Exhibits 21 and 31) – the new proposal for a mixed-use, eight-story condominium, would be much more compatible with Crimson's own 200 unit residential property, approved for the property across Woodmont Avenue, than the initial plan of ten townhouses for the subject site.

Section 59-C-7.16, Green Area

Textual Binding Element #4 of the Amended Development Plan calls for a minimum of 30% green area, thus meeting the 30% green-area requirement under the PD-75 density category.

Section 59-C-7.17, Dedication of Land for Public Use

Applicants previously dedicated of 596 square feet of right-of-way along Battery Lane. No additional dedication is planned.

Section 59-C-7.18, Parking Facilities

Off-street parking will be provided in accordance with Zoning Code §59-E-3.7, as discussed in Part III.D.3 c. of this report.

In sum, the Hearing Examiner finds that Applicants have complied with all of the purposes, standards and regulations of the PD-75 Zone, as set forth in Article 59-C of the Zoning Ordinance.

b. Safety, Convenience and Amenity of Residents

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” Since this required finding is practically identical with one of the purpose clause requirements for the PD-75 Zone, it has already been discussed in that context. As noted there, Applicants have provided the maximum in safety, convenience and amenities for the future residents of this development.

c. Compatibility with Adjacent Development

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. For the reasons discussed previously in this report, the Hearing Examiner concludes that the proposed mixed-use development will be compatible with other uses existing or proposed in the vicinity of the planned development.

3. Internal Vehicular and Pedestrian Circulation Systems and Site Access

The third required finding is:

That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

The development plan provides an improved pedestrian circulation network with wider sidewalks and better access for residents and the public traveling through the area. As noted

previously, the project is designed to provide safe, adequate, and efficient access for vehicles and pedestrians. Vehicular points of access will be provided on both Woodmont Avenue and Battery Lane. The Applicants have negotiated a common driveway agreement with the owner of the adjacent multi-family development to accommodate a shared driveway. As discussed in Part III.D.3.c. of this report, the overwhelming evidence is that the site will provide safe, adequate and efficient pedestrian and vehicular access. Accordingly, the Hearing Examiner finds that the proposed circulation systems and site access would be safe, adequate and efficient.

4. Preventing Erosion, Preserving Vegetation, Forest Conservation and Water Resources

The fourth required finding is:

That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

The site, which is mostly impervious at present, was significantly graded to construct the existing office building and parking lot. There are no forests, specimen trees or natural features existing on the site, and storm water management on such sites is typically limited to water quality control measures. Applicants' engineer, David Weber, explained that, for properties within the general area of central business districts, standard practice for the Department of Permitting Services is to grant a waiver of quantity controls, if the existing site is nearly or completely impervious. Since that is the case here, he anticipates that the County, will grant that approval again. 1/29/07 Tr. 114-115.

Applicants submitted a Natural Resources Inventory and Forest Stand Delineation (NRI/FSD) and received an exemption from the M-NCPPC as to forest conservation requirements in connection

with LMA G-808. Those are still in effect. 1/29/07 Tr. 111-112. A Preliminary Concept Storm Water Management and Sediment Control Plan was also approved by the Department of Permitting Services in conjunction with LMA G-808; however, Technical Staff determined that an amended plan must be filed prior to site plan review in the current case. Applicants agreed to add a textual binding element stipulating that a revised stormwater management concept plan will be submitted and must be approved prior to site plan. It is now Textual Binding Element #9.

In sum, the Hearing Examiner finds that Applicants have demonstrated the environmental controls required by “Finding (d).”

5. Ownership and Perpetual Maintenance

The fifth required finding is:

That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

The property is owned by Co-Applicant, Lawrence Lipnick, as demonstrated by the deed to the property filed as Exhibit 75. According to Applicants’ counsel, Applicants will form a condominium association, which will be responsible for maintenances of common and quasi-public areas. He submitted a sample “Declaration of Condominium” of the kind which will be used for this development (Exhibit 76). It includes a provision (Article 2, Section 2.1(b)) for maintenance of common elements by the “Council of Unit Owners.”

The Hearing Examiner finds that Applicants have sufficiently demonstrated both ownership of the property and their commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

6. The Public Interest

The final finding which is required under Maryland law is that the proposed development plan amendment will be in the public interest. The proposed development will promote the “health, safety, morals, comfort, and welfare of the inhabitants of the regional district” (*i.e.*, the public interest) by providing the kind of residential development called for in the *Bethesda CBD Sector Plan, as Amended in March 2006*, without any adverse effect on public facilities, as shown in Parts III.D.3. and V.B.1.c, above. It will offer an attractive gateway into the Bethesda CBD from the north, along Woodmont Avenue; it will provide affordable housing; it will offer amenities such as a street-level restaurant; and it will bring more residents within walking distance of Metro and a variety of convenience retail establishments in Bethesda. In sum, the proposed development plan amendment is in the public interest.

C. Conclusion

As demonstrated in Part V.B., all of the findings required by statute for the requested development plan amendment are appropriate in this case. The Technical Staff and the Planning Board both found that Applicants had satisfied the Master Plan and the zone’s requirements. Based on the foregoing analysis, and after a thorough review of the entire record, the Hearing Examiner agrees and further concludes that the proposed development plan amendment would be proper for the comprehensive and systematic development of the County.³¹

VI. RECOMMENDATION

I therefore recommend that Development Plan Amendment DPA 06-1, amending the development plan in LMA No. G-808 for the property located on part of Lot 48, Block 2, Northwest

³¹ It should be noted that an affirmative vote of six members is NOT required to approve this DPA pursuant to Zoning Ordinance §59-D-1.62 because it is bonus density, not a new zoning density category, that is being sought here.

Park Subdivision, Plat No. 134, in the Seventh Election District, at 4811 Battery Lane, in the northwest quadrant of Woodmont Avenue and Battery Lane in Bethesda, be approved in the manner requested and subject to the specifications and requirements of the Development Plan Amendment, Exhibit 78(b), provided that the Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan Amendment approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: April 6, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner